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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 121

PIERCE LONERGAN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 8, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

SUPREME COURT OF THE UNITED STATES

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[fol. 2]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

NOVEMBER TERM, 1934

No. 43515

UNITED STATES OF AMERICA, Plaintiff,

vs.

PIERCE LONERGAN and JOHN R. WALSH, Defendants

INDICTMENT, VIO. SECTION 338, TITLE 18, U. S. C. A.—Filed December 8, 1934

The grand jurors of the United States of America being duly selected, impaneled, sworn, and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

[fol. 3] Count I

"That heretofore and prior to the several acts of using the United States mails hereinafter set forth, [appellant], and John R. Walsh, • • • hereinafter in this indictment called defendants, had devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from [certain named persons] and divers other persons to the grand jurors unknown, all hereinafter in this indictment called investors, and being of the class of persons whom the said defendants believed they might induce to open margin accounts for trading in silver for future delivery; the said scheme and artifice being in substance and effect as follows, to wit:

"The said defendants, being engaged in the alleged silver brokerage business at Seattle, Washington, under the firm names of Pierce Lonergan and Company, Louis Martin and

Company, Gill and Company, and P. A. Jordan and Company, and operating the so-called Seattle Silver Market under the name of the Seattle Metal Exchange, would represent themselves and their said firms to the public as silver brokers of financial responsibility and standing, worthy of the confidence of the said investors and well qualified and in a position to advise them regarding investments in silver futures, and would advise and urge the said [fol. 4] investors to open accounts with them, the said defendants, and their said firms, and to purchase silver on margin for future delivery, and pay over to the said defendants their money on marginal payments therefor; and for the purpose of inducing the said investors to open such accounts, and purchase such silver futures on margin, the said defendants would pretend and represent that the Seattle silver market was entirely reliable and responsible and functioning in connection with the great silver markets at New York, London, Shanghai, and Bombay, and with prices following such markets; that the prices on the said Seattle Silver Market could not break substantially below such world markets because in case of an emergency such world markets would come to the support of the said Seattle exchange; that small investors could trade on the said Seattle market more advantageously than on the New York market because they could here purchase in smaller lots; that the price of silver was certain to advance and profits from purchase thereof would be practically certain; that investors ought to buy silver as a protection against inflation, because inflation was coming but an investor owning silver would not be adversely affected thereby; that assets in the form of silver would be as liquid as a bank account and more safe; that an investment could be made with as little as a $50.00 down payment; that all the money paid by investors on margin contracts was either used to purchase silver for future delivery on investor's contracts, or was held in a special clearing house fund until required [fol. 5] in settlement of such contracts; and that any investment in silver through the said defendants and their said firms, and through the said Seattle market would be absolutely safe for the said investor.

"Whereas, in truth and in fact, as the said defendants then and there well knew, the said defendants and their firms were not brokers of financial responsibility and stand-

ing, worthy of the confidence of the said investors, but were impecunious, financially irresponsible and without resources or ability to fulfill their commitments, and without qualifications for advising anyone regarding investments of any sort; the said Seattle Silver Market as operated by the said defendants would not be and was not reliable and responsible, and was not functioning in conjunction with the silver markets of the world, and prices thereon could not be depended upon to follow the world markets, but the said Seattle Market would be and was governed by the manipulations of the said defendants and their accessories; the representations regarding the desirability of investments in silver would be and were made only to lead investors to trade with the said defendants to their loss; it was true that the said defendants would accept subscriptions for only small amounts of silver, and would accept small margin payments thereon, but they would do so only for the purpose of enticing small and inexperienced investors into the speculative trading and to pay over their money to the said defendants, and the funds received by the said defendants on such accounts would not be and [fol. 6] were not all used to purchase silver or covered into a trust fund, and would not be and were not held for the future settlement with investors on their contracts, but would be and were appropriated and consumed by the said defendants in their operations and would be lost to the said investors.

"And it was a further part of the said scheme and artifice that when the said defendants should reach a point in their said operations where they could no longer conceal their shortages, they, the said defendants, would take steps deliberately and fraudulently to depress the price of silver on the said Seattle market far below the legitimate price, and would demand from said investors large additional sums of money to protect their accounts, well knowing that most of said investors would be unable to comply with such demands and so would have their equities wiped out, and said defendants would thus be able to close out the accounts of all excepting a very small number of such investors, and the said defendants intended so to defraud and would and did so defraud the said investors.

"And the said defendants, so having devised and intending to devise the scheme and artifice aforesaid, for the pur-

pose of executing the said scheme and artifice and attempting so to do, * * * did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in the United States Post Office at Seattle, in the Northern Division of [fol. 7] the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United States, a certain letter in an envelope with postage thereon duly prepaid, then and there addressed to Mr. Frank Givens, Port Orchard, Washington, the said letter so enclosed in said envelope being then and there in words and figures as follows, to wit: [Setting forth the letter] * * * [fol. 8] * * * contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Count II

That the said defendants, being the identical persons named as defendants in the first count of this indictment, and each of them, so having devised and intending to devise the scheme and artifice described in the first count of this indictment (the full description of which scheme and artifice in said first count being by this reference thereto incorporated herein and made a part of this second count as [fol. 9] fully as if here repeated), for the purpose of executing the said scheme and artifice and attempting so to do, on or about the fourteenth day of November, in the year of our Lord, one thousand nine hundred thirty-three, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in the United States Post Office at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United States, a certain letter in a so-called "window" envelope with postage thereon duly prepaid, then and there having enclosed the said letter in such manner as to have the address show through the "window" thereof, the address being L. C. McCaslin, Port Orchard, Wash., the said letter being dated at Seattle, Washington, November 13, 1933, and otherwise in words and figures as follows, to wit:

DEAR MAC:

I just discovered today that we had failed to send you a check with our statement. I am enclosing cashier's check for $668.35, as the balance due you on your account.

Silver is going up right along, but it has a long way to go yet before it reaches the top. You had better get in and get some more before you lose out altogether.

Yours very truly, Jack. J. R. Walsh.

Encl-1.
MR/W.

contrary to the form of the statute in such case made and [fol. 10] provided, and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Count III

That the said defendants, being the identical persons named as defendants in the first count of this indictment, and each of them, so having devised and intending to devise the scheme and artifice described in the first count of this indictment (the full description of which scheme and artifice in said first count being by this reference thereto incorporated herein and made a part of this third count as fully as if here repeated), for the purpose of executing the said scheme and artifice and attempting so to do, on or about the thirteenth day of July, in the year of our Lord, one thousand nine hundred thirty-four, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in the United States Post Office at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United States, certain circular advertising matter in the form of market letters in an envelope with third class postage thereon duly prepaid, then and there addressed to Mr. Frank Givens, Port Orchard, Wash., the first sheet of the said advertising matter so enclosed in the said envelope being in words and figures as fol- [fol. 11] lows, to wit:

Silver Markets: "Seattle, Shanghai, Bombay, London, New York, Seattle."

Seattle Silver Market

Market Letter

Seattle, Washington

July 13, 1934.

Announcement

The expanding activities of the Seattle Metal Exchange necessitated additional accom-odations. Friends and customers may obtain visitors cards for the purpose of inspecting these modern quarters where may be seen facilities connecting the Exchange with the important Silver markets of this country and the Orient. Under special arrangement with Western Union and the Radio Corporation of America, communication is had with Shanghai, China, in eight minutes. This service takes precedence over all commercial service in America. More than three hundred brokerage firms in Shanghai and vicinity obtain quotation service from Seattle and Seattle brokers have available, service from Shanghai with the same rapidity. Silver brokers and customer banks in San Francisco have a regular quotation service from Seattle. It is with a sense of pride and satisfaction in accomplishment that the member brokers of the Seattle Metal Exchange and their associates realize that Seattle has been put upon the Silver map of the World.

Your broker will be pleased to supply you and your friends with visiting cards which will admit you to the floor of the Seattle Metal Exchange.

Any information tendered or any opinion expressed herein is drawn from sources considered reliable, but no responsibility is assumed by us for the accuracy thereof.

the second sheet of said enclosures bearing like letterhead and date July 13, 1934, headed Silver and the first paragraph thereunder reading as follows:

[fol. 12] Perhaps the most important Reconstructive Legislation in modern times—with inconceivable National and International effects—was effected on Tuesday, June 19th, when the President of the United States signed the Silver Purchase Act of 1934.

the third sheet likewise enclosed in the said envelope being on a letterhead like the two already described and thereafter headed

Silver Purchase Act of 1934

and bearing at the end thereof the following:

Louis Martin Co.

Member Seattle Metal Exch.

211 American Bank Bldg.

Eliot 3055

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Count IV

That the said defendants, being the identical persons named as defendants in the first count of this indictment, and each of them, so having devised and intending to devise the scheme and artifice described in the first count of this indictment (the full description of which scheme and artifice in said first count being by this reference thereto incorporated herein and made a part of this fourth count as fully as if here repeated), for the purpose of executing the said scheme and artifice and attempting so to do, on or [fol. 13] about the twenty-eighth day of July, in the year of our Lord, one thousand nine hundred thirty-four, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in the United States Post Office at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United States, a certain letter in an envelope with postage and special delivery stamp thereon affixed, then and there addressed to Frank Anderson, 2021½ Yale North, Seattle,

Wash., the said letter so enclosed in the said envelope being then and there in words and figures as follows, to wit:

Norman Edward Company,
Bullion Brokers,
Insurance Building,
Seattle, Washington
Main 7626
Cable Address, "NORED" Seattle.

July 28, 1934.

Frank Anderson, 2021½ Yale North, Seattle, Washington

DEAR SIR:

The security is impaired upon your contract for the purchase of one September Silver. Due to market conditions, we are compelled to require additional margins in an amount sufficient to protect your account.

Unless these guarantees are given on or before 3:00 p. m., Monday, July 30, 1934, we will sell out your account at the market at 9:30 a. m., Tuesday, July 31, 1934, or as soon thereafter as is possible.

We shall be compelled to hold you liable for any deficit on your account.

[fol. 14] Yours truly, Norman Edward Company, by Norman E. Coles, Manager.

NEC:g.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Count V

That the said defendants, being the identical persons named as defendants in the first count of this indictment, and each of them, so having devised and intending to devise the scheme and artifice described in the first count of this indictment (the full description of which scheme and artifice in said first count being by this reference thereto incorporated herein and made a part of this fifth count as

fully as if here repeated), for the purpose of executing the said scheme and artifice and attempting so to do, on or about the thirtieth day of July, in the year of our Lord, one thousand nine hundred thirty-four, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in the United States Post Office at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United States, a certain letter in an envelope with postage thereon duly prepaid, [fol. 15] then and there addressed to Norman Edward Co., 612 Insurance Bldg., Seattle, Wash., the said letter so enclosed in the said envelope being then and there on the letterhead of Louis Martin Company, dated July 30, 1934, and further in words and figures as follows, to wit:

Norman Edward Co., 612 Insurance Bldg., Seattle, Wash.

GENTLEMEN:

Your failure to make satisfactory deposits on your contacts for the purchase of three hundred seventy-two September and three hundred seventy-five December silver will make it necessary for us to liquidate your account.

This is to notify you that unless satisfactory arrangements are made prior thereto, we will sell out your account at 9:30, Tuesday morning, July 31, 1934, or as soon thereafter as we can do so, at the market.

We will be compelled to hold you responsible for any deficit.

Yours truly, Louis Martin Co. J. R. Walsh.

JRW:MLH.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Count VI

That the said defendants, being the identical persons named as defendants in the first count of this indictment, and each of them, so having devised and intending to devise [fol. 16] the scheme and artifice described in the first count

of this indictment (the full description of which scheme and artifice in said first count being by this reference thereto incorporated herein and made a part of this sixth count as fully as if here repeated), for the purpose of executing the said scheme and artifice and attempting so to do, on or about the thirtieth day of July, in the year of our Lord, one thousand nine hundred thirty-four, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in the United States Post Office at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United States, a certain letter in an envelope with postage and special delivery stamp thereon affixed, then and there addressed to Mrs. Lilian J. Lyman, Assembly Hotel, Seattle, Wash., the said letter so enclosed in the said envelope being then and there on the letterhead of Louis Martin Company, dated July 30, 1934, and further in words and figures as follows, to wit:

Mrs. Lilian J. Lyman, Assembly Hotel, Seattle, Washington.

DEAR MADAM:

Your failure to make satisfactory deposits on your contracts for the purchase of five December Silver will make it necessary for us to liquidate your account.

[fol. 17] This is to notify you that unless satisfactory arrangements are made prior thereto, we will sell out your account at 9:30, Tuesday morning, July 31, 1934, or as soon thereafter as we can do so, at the market.

We will be compelled to hold you responsible for any deficit.

Yours truly, Louis Martin Company. J. R. Walsh.

JRW:g.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Count VII

That the said defendants, being the identical persons named as defendants in the first count of this indictment, and each of them, so having devised and intending to devise

the scheme and artifice described in the first count of this indictment (the full description of which scheme and artifice in said first count being by this reference thereto incorporated herein and made a part of this seventh count as fully as if here repeated), for the purpose of executing the said scheme and artifice and attempting so to do, on or about the second day of August, in the year of our Lord, one thousand nine hundred thirty-four, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in the United States Post Office at Seattle, in the Northern [fol. 18] Division of the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United States, a certain letter in a so-called "window" envelope with postage thereon duly prepaid, then and there having enclosed the said letter in such manner as to have the address show through the "window" thereof, the address being Mrs. Lilian J. Lyman, Assembly Hotel, 9th & Madison, Seattle, Wash., the said letter so enclosed in the said envelope being then and there on the letterhead of the said Louis Martin Company, dated August 1, 1934, addressed to the said Mrs. Lilian J. Lyman, and otherwise in words and figures as follows, to wit:

DEAR MRS. LYMAN:

In order to protect ourselves from further losses, and in compliance with notice heretofore sent you, we have closed your silver contract account by selling your silver, as per the enclosed confirmation.

If there are any errors or corrections in your account, please advise us at once.

Yours truly, Louis Martin Co., by J. R. Walsh.

JRW/HL
Enc/.

there being enclosed with the said letter in the said envelope a notice from the said Louis Martin Company to the said Mrs. Lilian J. Lyman dated July 31, 1934, advising of the [fol. 19] sale for her account of twenty-five hundred (2500) ounces of December silver at the price of 41, and a statement of her account of the same date showing the same closed; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Count VIII

That the said defendants, being the identical persons named as defendants in the first count of this indictment, and each of them, so having devised and intending to devise the scheme and artifice described in the first count of this indictment (the full description of which scheme and artifice in said first count being by this reference thereto incorporated herein and made a part of this eighth count as fully as if here repeated), for the purpose of executing the said scheme and artifice and attempting so to do, on or about the twenty-fourth day of August, in the year of our Lord, one thousand nine hundred thirty-four, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in the United States Post Office at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United States, a certain letter in an envelope with postage and special delivery stamp thereon affixed, then and there ad-
[fol. 20] dressed to Mr. J. I. Romer, 510 Second Ave., Seattle, Wash., the said letter so enclosed in the said envelope being then and there on the letterhead of Norman Edward Company, dated August 23, 1934, and further in words and figures as follows, to wit:

Mr. J. I. Romer, 510 Second Avenue, Seattle, Washington.

Dear Mr. Romer:

This is to advise you that the condition of your account for the purchase of twenty-four September Silver is such as to be greatly impaired, and we are hereby demanding additional security.

You are hereby requested to deposit with us the sum of Three Thousand Seven Hundred Twelve Dollars and Forty-one cents ($3712.41) on or before 10:30 A. M., Monday, August 27, 1934.

In the event of your failure so to do, your account will be closed and your contracts sold at the market, subject to

and under the provisions of the terms of your agreement with us.

Yours truly, Norman Edward Company, by Norman E. Coles.

NEC:MEL.

I do hereby acknowledge receipt of the foregoing letter.

J. I. Romer.

there being further enclosed with the said letter in the said envelope a purported carbon copy of another letter in words and figures as follows, to wit:

[fol. 21] August 23, 1934.

Norman Edward Co., 612 Insurance Bldg., Seattle, Wash.

GENTLEMEN:

This is to advise you that the condition of your account for the purchase of eighteen December Silver and Twenty-five September Silver is such as to be greatly impaired, and we are hereby demanding additional security.

You are hereby requested to deposit with us the sum of Twelve Thousand Seven Hundred Forty-six Dollars and Forty-eight cents ($12746.48) on or before 10.30 A. M., Monday, August 27, 1934.

In the event of your failure so to do, your account will be closed and your contracts sold at the market, subject to and under the provisions of the terms of your agreement with us.

Yours truly, Louis Martin Co., (Signed) J. R. Walsh.

JRW:MLH.

A true and correct copy. M. Latimer.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Count IX

That the said defendants, being the identical persons named as defendants in the first count of this indictment,

and each of them, so having devised and intending to [fol. 22] devise the scheme and artifice described in the first count of this indictment (the full description of which scheme and artifice in said first count being by this reference thereto incorporated herein and made a part of this ninth count as fully as if here repeated), for the purpose of executing the said scheme and artifice and attempting so to do, on or about the twenty-fourth day of August, in the year of our Lord, one thousand nine hundred thirty-four, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in the United States Post Office at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United States, a certain letter in an envelope with postage thereon duly prepaid, then and there addressed to Norman Edward Co., 612 Insurance Bldg., Seattle, Washington, the said letter so enclosed in the said envelope being then and there on the letterhead of Louis Martin Company, dated August 24, 1934, and further in words and figures as follows, to wit:

Norman Edward Co., 612 Insurance Bldg., Seattle, Washington.

GENTLEMEN:

This is to advise you that we have been unable to successfully negotiate the reinstatement of your contracts for the purchase of twenty-three thousand ounces of Silver for September delivery and forty-six thousand ounces of Silver for December delivery, due to the fact that you have not on deposit sufficient money to guarantee or secure perform- [fol. 23] ance of the contracts. We have been attempting to negotiate the use of three thousand dollars deposited to your credit with the Bank of California, but find that the deposit of security in this form is not acceptable, and further is insufficient to furnish satisfactory guarantee. Therefore, unless you are able to deposit with us the sum of twenty-seven thousand, seven hundred, twenty-six dollars and nine cents ($27,726.09) as additional security on or before Tuesday noon, August 28, 1934, we shall be unable to extend you any further consideration in the matter and we must insist upon the strict compliance with the

terms and provisions of your contract as originally made without modification, and subject to all of its terms, provisions, and conditions thereof.

Very truly yours, Louis Martin Co., by J. R. Walsh.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Count X

That the said defendants, being the identical persons named as defendants in the first count of this indictment, and each of them, so having devised and intending to devise the scheme and artifice described in the first count of this indictment (the full description of which scheme and artifice in said first count being by this reference thereto incorporated herein and made a part of this tenth count as fully as if here repeated), for the purpose of executing the said scheme and artifice and attempting so to do, on or about the thirtieth day of July, in the year of our Lord, one thou-[fol. 24] sand nine hundred and thirty-four, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in the United States Post Office at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United States, a certain letter in an envelope with postage thereon duly prepaid, then and there addressed to Mr. Gerald Fitzgerald, 11556 Phinney Ave., Seattle, Washington, one of the investors aforesaid, which letter so enclosed in the said envelope, when so placed in the United States Post Office, was then and there in words and figures as follows, to wit:

Eliot 3055-6-7.

Gill & Co.,

Bullion Brokers,

Members Seattle Metal Exchange,

American Bank Building

Cable Address "LUGIL" Seattle.

Seattle, Washington, July 30, 1934.

Mr. Gerald Fitzgerald, 11556 Phinney Ave., Seattle, Washington.

DEAR MR. FITZGERALD:

Your failure to make satisfactory deposits on your contracts for the purchase of eleven September Silver will make it necessary for us to liquidate your account.

This is to notify you that unless satisfactory arrangements are made prior thereto, we will sell out your account at 9:30, Tuesday morning, July 31, 1934, or as soon thereafter as we can do so, at the market.

[fol. 25] We will be compelled to hold you responsible for any deficit.

Yours truly, Gill & Co., L. J. Gill, by M. R.

LJG: MR.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

J. Charles Dennis, United States Attorney. John Ambler, Asst. United States Attorney.

Endorsed: A true Bill. B. F. Blackburn, Foreman Grand Jury. J. Charles Dennis, United States Attorney.

Endorsed: Presented to the Court by the Foreman of the Grand Jury in open court in the presence of the Grand Jury, and Filed in the U. S. District Court Dec. 8, 1934, Edgar M. Lakin, Clerk, by Truman Egger, Deputy.

[fol. 26] IN UNITED STATES DISTRICT COURT

DEMURRER OF PIERCE LONERGAN

Comes now the defendant, Pierce Lonergan, and demurs to the indictment herein, and each and every count therein, as follows:

I

That count 1 of the indictment herein, and each and every count thereof, does not state facts sufficient to constitute a crime under Section 338, Title 18 U. S. C. A., or under any law of the United States.

II

That the allegations of count 1 of the indictment herein, and each and every count thereof, are so vague, indefinite, uncertain, ambiguous and generalized that they do not apprise the defendant of the true nature and cause of the accusation contained in said counts of the indictment, and each of them.

Donald A. McDonald, Carl B. Luckerath, E. L. Tong, Attorneys for Defendant Pierce Lonergan. Office and Post Office Address: 855 Empire Building, Seattle, Washington.

Endorsed: Received copy of the within Demurrer this 15th day of April, 1936. J. Charles Dennis, Attorney for Pltff.

[fol. 27] IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY OF TRIAL

(Demurrer Overruled. Motion to elect denied. Arraignment and plea. Motion to Dismiss denied.)

Now on this 16th day of April, 1936, J. Charles Dennis, United States District Attorney, Owen P. Hughes and F. A. Pellegrini, Assistant United States District Attorneys, appearing for the plaintiff and D. A. McDonald, Esq., appearing for the defendant, this cause is called for trial as to defendant Pierce Lonergan, who requests leave to present to the Court the demurrer which was filed April 15, 1936.

All jurors in attendance are withdrawn from the court room and counsel for defendant given a limited time for argument of the demurrer. The demurrer is overruled and exception allowed. The defendant then orally moves that the government be required to elect upon what charge in the indictment the trial will proceed. The motion is denied and an exception allowed. The defendant, Pierce Lonergan, is arraigned and answers that his true name is Pierce Lonergan. He waives reading of the indictment and enters a plea of not guilty to all counts. The jurors are returned to the court room and twelve jurors called to the box and sworn on voir dire. The government counsel makes statement of the case and examination of the jurors on voir dire proceeds. At 11:20 a ten minute recess is taken, jurors in the box and all members of the panel being admonished by the Court. The trial is resumed with all members in the [fol. 28] box, defendant and attorneys being present. The jury having been empanelled and sworn the plaintiff's counsel makes opening statement of the case to the jury. The defendant reserves his statement. A ten minute recess is taken at 3:25 P. M., during which defendant moves for a dismissal, or directed verdict on the plaintiff's statement of the case. The motion is denied, and an exception is allowed. The trial is resumed, all jurors, defendant, and attorneys being present. Witnesses for the plaintiff are sworn and examined as follows: W. G. Coventry. The plaintiff's exhibits numbered 1 to 4, inclusive, are admitted in evidence. The jury is admonished and the trial continued until 10 A. M. tomorrow.

[fol. 29] IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY

Trial Resumed (Counts 7, 9, and 10 Dismissed)

Now on this 6th day of May, 1936, J. Charles Dennis, United States District Attorney and Owen P. Hughes, Assistant United States District Attorney appearing for the plaintiff, and Attorneys McDonald, Wilkerson, Luckerath and Tong, appearing for the defendant, the trial of this cause is resumed pursuant to adjournment had, with all jurors, defendant, and attorneys present. * * * At 2:40 P. M. the plaintiff rests. The defendant moves to strike

from the record certain testimony of prosecution witnesses, as set out in written motion now filed with permission of the Court, which motion is denied in toto and exception allowed. Defendant orally challenges the sufficiency of the evidence, as to all counts in the indictment, and particularly as to Counts 7, 9, and 10, thereof, and moves for a directed verdict. The plaintiff confesses motion as to Counts 7, 9, and 10 of the indictment, and it is so ordered. Defendant's challenge and motion as to all of the remaining counts is argued by defendants counsel, denied, and exception allowed. Oral motion to require plaintiff to elect is denied, exception allowed. * * * *

[fol. 30] IN UNITED STATES DISTRICT COURT

VERDICT—Filed May 15, 1936

We, the Jury in the above-entitled cause, find the defendant Pierce Lonergan is guilty as charged in Count I of the Indictment herein; is guilty as charged in Count II of the Indictment herein; is guilty as charged in Count III of the Indictment herein; is guilty as charged in Count IV of the Indictment herein; is guilty as charged in Count V of the Indictment herein; is guilty as charged in Count VI of the Indictment herein; and is guilty as charged in Count VIII of the Indictment herein.

Francis H. P. Rogers, Foreman.

[File endorsement omitted.]

[fol. 31] IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR NEW TRIAL

Now on this 28th day of May, 1936, J. Charles Dennis, United States District Attorney, and F. A. Pellegrini, Assistant United States District Attorney appearing for the plaintiff, and Attorneys D. A. McDonald and Carl Luckerath appearing for the defendant, this matter now comes on for sentence on verdict of guilty, 7 counts, indictment, and Motion for New Trial, the defendant and all parties being present in court. On Call of this matter for disposi-

tion the Court states that on Monday last an order was entered, on agreement of counsel, continuing this matter until Friday, May 29th at 4:30 P. M., and later in the day counsel for the Government advised the Court of a preference to have the hearing at this time instead of Friday, and it was so ordered. The Court now asks the defendant if it is his wish to dispose of the matter now and the defendant advises the Court such is his desire.

On call of the Motion for New Trial for hearing, D. A. McDonald, Esq., states his failure to file the motion in time and that he believes himself without authority under the Supreme Court Rules to now present it. The Court reads the motion, and on statement of the United States District Attorney that he is willing that the Court consider the motion on the merits the Court states that the motion will [fol. 32] be considered, as if timely made. Neither defendant's counsel nor the United States District Attorney presents any argument thereon.

The motion for new trial is denied and an exception is allowed the defendant.

* * * * * * * *

[fol. 33] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

No. 43515

UNITED STATES OF AMERICA, Plaintiff,

v.

PIERCE LONERGAN, Defendant

JUDGMENT

Comes now on this 28th day of May, 1936, the said defendant, Pierce Lonergan, into open court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of violation

of Sec. 338, Title 18, U. S. C. A., (using the United States mails with intent to defraud) as charged in Counts 1, 2, 3, 4, 5, 6 and 8 of the Indictment, and that he be punished by being committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in the United States Penitentiary at McNeil Island, Washington, or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of Three (3) years on Count 1 of the Indictment; and that he be further imprisoned for the period of three (3) years [fol. 34] on each of the said counts 2, 3, 4, 5, 6 and 8 of the Indictment, said terms of imprisonment to run concurrently and not consecutively with the term of imprisonment imposed on Count 1 of the Indictment; and that the said defendant pay the taxable costs of prosecution herein. And the said defendant, Pierce Lonergan, is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

[fol. 35] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed May 23, 1936

Name and address of appellant: Pierce Lonergan, 948 Eighteenth Avenue North, Seattle, Washington.

Name and address of appellant's Attorneys: Carkeek, McDonald & Harris, 1164 Empire Building, Seattle, Washington, Carl B. Luckerath and Eugene L. Tong, 855 Empire Building, Seattle, Washington.

Offense: Violation of Section 388, Title 18, U. S. C. A., having devised a scheme and artifice to defraud by inducing persons to purchase silver futures contracts by false representations, and manipulating the market so as to wipe out money paid in as margins, and using the mails to promote such fraud.

Date of Judgment: May 28, 1936.

Description of Judgment or Sentence: Sentenced to the care and custody of the Attorney General of the United States or his authorized representative for confinement in McNeil Island Penitentiary, or such other penal institution as the Attorney General of the United States may designate, for a period of three (3) years and to pay the costs of this action.

Name of prison where now confined, if not on bail: At liberty on bail.

I, the above named Apellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from [fol. 36] the judgment above mentioned on the grounds set forth below.

Pierce Lonergan, Appellant.

Dated May 28, 1936.

Grounds of Appeal

1. The trial Court erred in refusing to give the following requested instruction:

"Each juror must join in the conclusion that the accused is guilty of the offense as charged beyond a reasonable doubt; as long as one juror does not entertain such a doubt you cannot convict, and all you can do is to report an agreement impossible."

2. That said verdict as to each and every court upon which defendant was found guilty was against and contrary to law.

3. That said verdict as to each of said counts was against and contrary to the evidence.

4. Insufficienty of the evidence to justify the verdict as to said counts.

5. That matters occurred in said trial prejudicial to the defendant and prevented him having a fair and impartial trial by the jury is this: The court erred in refusing to declare a mistrial on account of the improper elicitation by the Assistant United States Attorney of the fact that one of the investor witnesses has lost his life insurance policy, which taken together with the hysterical outbursts of two women investors, was so prejudicial that it could not be [fol. 37] cured by the statement of the court to disregard it; to which refusal of the court to declare a mistrial the defendant excepted at the time.

6. The trial court erred in admitting in evidence, over the objection of the defendant, plaintiff's Exhibits 75, 90 and 91, upon the ground that the same did not tend to prove any issue in the case and tended to prove the defendant guilty of crimes with which he was not charged, and was prejudicial to the defendant before the jury.

7. The trial court erred in overruling defendant's motion for a directed verdict on all counts at the close of the Government's case, upon the ground that the Government had failed to prove sufficient facts to make a case as to the commission of the crimes charged in said counts.

8. The trial court erred in overruling defendant's motion for a directed verdict on all the counts of the indictment at the conclusion of the entire case, upon the ground that there was no competent proof before the jury as to the commission of the offenses charged in said indictment.

9. The trial court erred in admitting the evidence of witnesses R. J. Romer and May McGrew, as to representations made by salesman McKnight in the absence of the defendant and there being no evidence that the same were authorized or ratified by him.

10. The trial court erred in regard to each and every instruction wherein defendant made objection thereto and which were by the court overruled, and which exceptions were at the time made in the presence of the jury.

[fol. 38] 11. The trial court erred in his refusal to give each and every instruction asked by defendant which was refused by the court, and for the modification of each instruction asked when instructions asked were modified by the court, and to the refusal to the giving of each of said instructions or to the modification of each of said instructions defendant at the time objected and made his exception in the presence of the jury.

12. That there was a fatal variance between the charge of the indictment to the effect that the scheme of the defendant was to break the silver market, and the proof relating to breaking the silver futures contracts market.

13. That the trial court erred in permitting evidence of losses sustained by investors, and particularly in admitting the evidence as to the extent thereof and the deplorable consequences thereof to such investors.

14. The trial court erred in overruling defendant's demurrer to the indictment herein.

Received copy of the within notice of appeal this 28th day of May, 1936.

J. Charles Dennis, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL IN FORMA PAUPERIS—Filed May 28, 1936

This matter coming on regularly before the undersigned Judge of the above entitled Court this day on application of Pierce Lonergan, for an order to prosecute his appeal herein in forma pauperis, and the said defendant having presented his affidavit in support of such application, as required by the law and rules of this Court, and the Court having considered the same,

It is now, therefore, Ordered, That the defendant, Pierce Lonergan, be, and he hereby is, authorized to prosecute his appeal herein without prepayment of costs and/or fees on typewritten record and briefs, and the clerk of the above entitled Court be, and he hereby is, directed and ordered to forthwith prepare and certify under general practice the transcript of record herein without prepayment of costs, including in such transcript a copy of this order. Done in Open Court this 28th day of May, 1936.

John C. Bowen, United States District Judge.

Presented by D. A. McDonald.

[File endorsement omitted.]

[fol. 40] IN UNITED STATES DISTRICT COURT

ORDER AS TO RECORD ON APPEAL—Filed May 23, 1936

It appearing to the undersigned trial judge that the appellant above named, on the 28th day of May, 1936, filed with the Clerk of this court a notice of appeal in the above entitled cause,

Now therefore, in pursuance of the Rules of Practice and Procedure in Criminal Cases adopted by the Supreme Court of the United States on May 7, 1934,

It is Ordered that the above named appellant or his attorney and the United States Attorney do appear before the undersigned trial judge on the 1st day of June, 1936, at ten o'clock a. m. at the city of Seattle, in the court room of the

above entitled court, for such directions as may be appropriate with respect to the preparation of the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings; and as to the time for the filing of an assignment of the errors of which the appellant complains if the record on appeal is to be without a bill of exceptions; as to the preparation and filing of the bill of exceptions and the settlement of the same by the undersigned trial judge; as to the contents of the transcript of record on said appeal and as to the time for the filing of said record with clerk's certificate in the United States Circuit Court of Appeals for the Ninth Circuit, and as to all other matters pertinent to said appeal.

[fol. 41] It is further ordered that the Clerk of this court do forthwith serve a certified copy of this order by mail or in person on the appellant or his attorneys and on the United States Attorney for this district.

Dated, Seattle, May, 28, 1936.

John C. Bowen, District Judge.

[File endorsement omitted.]

[fols. 42-43] Bail bond on appeal for $1,000.00 filed May 23, 1936, omitted in printing.

[fol. 44] IN UNITED STATES DISTRICT COURT

DOCKET ENTRY SHOWING DATE OF LODGING BILL OF EXCEPTIONS

* * * * * * *

Aug. 8, 1936. Lodged Bill of Exceptions, Deft. Lonergan.

* * * * * * *

[fol. 45] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

Before Hon. John Bowen, Judge

No. 43,515

UNITED STATES OF AMERICA, Plaintiff,

vs.

PIERCE LONERGAN et al., Defendants

Bill of Exceptions of Defendant, Pierce Lonergan.

The above entitled cause came on for trial on Thursday, April 1936, at the hour of 10 o'clock A. M. in the City of Seattle, King County, State of Washington, J. Charles Dennis, U. S. District Attorney, and Owen Hughes, Assistant U. S. District Attorney, appearing for the plaintiff, Donald McDonald, Esq., Carl Buckerath and Eugene Tong appearing for the defendant, Pierce Lonergan, whereupon the following proceedings were had:

(Jury absent.)

COLLOQUY

Mr. Tong: If Your Honor please, we have a demurrer to the indictment on behalf of the defendant Pierce Lonergan, on the ground that the allegations of Count 1 and the allegations of the other Counts all making reference to Count 1 fail to state facts sufficient to constitute a violation of section 338 N. S. C. A. and on the further ground that the allegations in the indictment are so vague and general and ambiguous that it is impossible for the defendant to apprise himself of the nature of the charges against him, and for the reason that, because of the ambiguity and generality, it is impossible for him to determine the nature of his proceedure to meet any alleged cause of action that may be read from the complaint. I don't know whether Your [fol. 46] Honor is familiar with the complaint itself.

The Court: The indictment?

Mr. Tong: With the indictment itself?

The Court: Yes, I have considered it.

Mr. Tong: But there are several matters that I would like to call your attention to. In the first place, in the preamble on page 2 it is alleged: That said persons and other per-

sons all hereinafter in this indictment called investors—for trading in silver for future delivery. And I call Your Honor's attention to the phraseology "silver for future delivery". The said scheme and artifice being in substance and effect as follows, to wit: Thereafter alleging that Pierce Lonergan operated or caused to be operated several companies purporting to be in the business of brokering or dealing in silver.

Now I call Your Honor's attention to line 24, page 2 as follows: Would represent themselves and their said firms to the public as silver brokers. The purpose of the reference being to show the distinction between silver for future delivery and silver as a commodity.

We have gone to great length in preparation for discussing the demurrer, to set out certain distinctions and certain peculiarities that really constitute two alleged schemes, neither of which is sufficiently alleged to either one of them constitutes a violation. The first would be a scheme to defraud through prevailing upon investors to enter into contracts for silver futures or to go into a so-called futures market. The second refers to prevailing upon investors to invest in or buy silver upon a silver market. There is a distinction in fact between a silver futures market and silver as a commodity, or a silver market, just as there is a dis-[fol. 47] tinction in fact between a grain market, or spot market and a grain futures market. Neither term is synonymous, and neither term is interchangeable.

From the reading of the indictment it will be noticed that it is faulty in that respect, in that it uses these terms interchangeably, so that it is impossible to determine whether the Government prefers a charge under a scheme to defraud under a silver futures market or whether the Government charges that the defendant devised a scheme intending to defraud through the use of a silver market, both of which are separate and distinct offenses, would be if they were completely set out in the scheme, and either one of which might later be returned in a further indictment irrespective of the outcome in this particular case, so that the defendant would be losing, and would be prevented from having his constitutional rights by being twice placed in jeopardy.

We have briefed this matter very thoroughly, and I am going to ask the court to go along with me for a few minutes while I read from the authorities and the comments in our

brief. And because we feel that this is not a merely perfunctory proceeding as far as the demurrer is concerned, we would like to have the Court consider these authorities together with some other authorities that I would cite.

(Argument by respective counsel.)

ORDER OVERRULING DEMURRER

The Court: The demurrer is overruled. Exception allowed to defendant.

ORDER OVERRULING MOTION FOR ORDER REQUIRING GOVERNMENT TO ELECT

Mr. McDonald: At this time, Your Honor, I would like to move, in order to preserve our record, that the Government be required to elect between these two schemes as to which one they intend to try the defendant Lonergan on.

The Court: The motion is denied.

[fol. 48] Mr. McDonald: Exception.

The Court: Exception allowed.

PLEA OF NOT GUILTY

Mr. Hughes: If I understand the record correctly, there has been no arraignment or plea to this indictment.

Mr. Lonergan: That is right. A plea of not guilty.

The Court: You waive reading of the indictment?

Mr. Lonergan: Yes.

The Court: And enter a plea of not guilty on each and all the counts?

Mr. Lonergan: I do.

The Court: Let the record so show. The Clerk will call a jury.

A jury having been impaneled and sworn to try the case, thereupon the following proceedings were had, testimony taken, and evidence, oral and documentary, was introduced on behalf of the United States as follows:

OPEN STATEMENT FOR THE UNITED STATES

Mr. Hughes: If the Court please, and members of the jury, following the customary practice, I will now make the opening statement, and will state at this time what the Government intends to prove here and will prove in support of the allegations of the indictment. The purpose of such a statement, of course, is to enable the jury to understand the evidence after the evidence is introduced from the witness stand.

Most of you were present in the Courtroom when I ex- [fol. 49] plained the nature of the charges contained in this indictment. The indictment, as I have already explained, charges—there are two defendants, namely, Pierce Lonergan and John R. Walsh, but as I explained this morning, we are only concerned with the defendant Pierce Lonergan. The defendant John R. Walsh has interposed a plea of nolo contendere, which is tantamount, or means that he does not contest the case. So therefore, in considering this whole case, your considerations, of course, will be limited to the one defendant who is now standing trial.

The indictment here as returned by the grand jury charges a violation of Section 338 of Title 18 of the criminal code of the United States, and is more commonly known as the postal laws, violation of the postal laws of the United States.

The indictment which has been returned by the grand jury consists of ten Counts. At this time I am going to take the liberty of reading Count 1. I shall not follow that with the remaining Counts.

Count 1 of this indictment charges as follows: "That heretofore and prior to the several acts of using the United States mails hereinafter set forth, Pierce Lonergan and John R. Walsh, whose true and full names are to the grand jurors unknown, and each of them, both hereinafter in this indictment called defendants, had devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from Frank Givens, L. C. McCaslan, Frank Anderson, the Reverend G. Fitzgerald, Mrs. Lillian J. Lyman, J. I. Romer, and divers other persons to the grand jurors unknown, all hereinafter in this indictment called investors, and being of the class of persons whom the said defendants believed they might

induce to open margin accounts for trading in silver for [fol. 50] future delivery; the said scheme and artifice being in substance and effect as follows, to wit:

That said defendants, being engaged in the alleged silver brokerage business at Seattle, Washington, under the firm names of Pierce Lonergan and Company, Louis Martin and Company, Gill and Company, and P. A. Jordan and Company, and operating the so-called Seattle Silver Market under the name of the Seattle Metal Exchange, would represent themselves and their said firms to the public as silver brokers of financial responsibility and standing, worthy of the confidence of the said investors and well qualified and in a position to advise and urge the said investors to open accounts with them, the said defendants, and their said firms, and to purchase silver on margin for future delivery, and pay over to the said defendants their money on marginal payments therefor; and for the purpose of inducing the said investors to open such accounts, and purchase such silver futures on margin, the said defendants would pretend and represent that the Seattle silver market was entirely reliable and responsible and functioning in connection with the great silver markets at New York, London, Shanghai, and Bombay, and with prices following such markets; that the prices on the said Seattle Silver Market could not break substantially below such world markets because in case of an emergency such world markets would come to the support of the said Seattle market more advantageously than on the New York market because they could here purchase in smaller lots; that the price of silver was certain to advance and profits from purchase thereof would be practically certain; that investors ought to buy silver as a protection against inflation, because inflation was coming but an investor owning silver would not be adversely affected [fol. 51] thereby; that assets in the form of silver would be as liquid as a bank account and more safe; that an investment could be made with as little as $50.00 down payment; that all the money paid by investors on margin contracts was either used to purchase silver for future delivery on investors' contracts, or was held in a special clearing house fund until required in settlement of such contracts; and that any investment in silver through the said defendants and their said firms, and through the said Seattle market would be absolutely safe for the said investor.

Whereas, in truth and in fact, as the said defendants then and there well knew, the said defendants and their firms were not brokers of financial responsibility and standing, worthy of the confidence of the said investors, but were impecunious, financially irresponsible and without resources or ability to fulfill their commitments, and without qualifications for advising anyone regarding investments of any sort; the said Seattle Silver Market as operated by the said defendants would not be and was not reliable and responsible, and was not functioning in conjunction with the silver markets of the world, and prices thereon could not be depended upon to follow the world markets, but the said Seattle Market would be and was governed by the manipulations of the said defendants and their accessories; the representations regarding the desirability of investments in silver would be and were made only to lead investors to trade with the said defendants to their loss; it was true that the said defendants would accept subscriptions for only small amounts of silver, and would accept small margin payments thereon, but they would do so only for the purpose of enticing small and inexperienced investors into the speculative trading and to pay over their money to the said defendants, and the funds received by the said defendants [fol. 52] on such accounts would not be and were not all used to purchase silver or covered into a trust fund, and would not be and were not held for the future settlement with investors on their contracts, but would be and were appropriated and consumed by the said defendants in their operations and would be lost to the said investors.

And it was a further part of the said scheme and artifice that when the said defendants should reach a point in their said operations where they could no longer conceal their shortages, they, the said defendants, would take steps deliberately and fraudulently to depress the price of silver on the said Seattle market far below the legitimate price, and would demand from said investors large additional sums of money to protect their accounts, well knowing that most of said investors would be unable to comply with such demands and so would have their equities wiped out, and said defendants would thus be able to close out the accounts of all excepting a very small number of such investors, and the said defendants intended so to defraud and would and did so defraud the said investors.

And the said defendants, so having devised and intending to devise the scheme and artifice aforesaid, for the purpose of executing the said scheme and artifice and attempting so to do, on or about the sixteenth day of December, in the year of our Lord one thousand nine hundred thirty-three, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in the United States Post Office at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United [fol. 53] States, a certain letter in an envelope with postage thereon duly prepaid, then and there addressed to Mr. Frank Givens, Port Orchard, Washington, the said letter so enclosed in said envelope being then and there in words and figures as follows, to wit:

Louis Martin Company,

Bullion Brokers,

American Bank Building,

Seattle, Washington

Eliot 3055

Cable Address 'Lomar', Seattle.

December 16, 1933.

Mr. Frank Givens, Port Orchard, Washington.

DEAR MR. GIVENS:

We wish to thank you for the account that you have opened with us today, and for your orders for the purchase of silver. Enclosed you will find our receipt for the sum of money deposited by you, together with the confirmations of the purchases of silver futures that we have obtained for you on the Seattle Metal Exchange.

On the first of each month, we will mail you a detailed statement of your account, and every week you will receive our market letter which will keep you advised as to the price fluctuation and activities in the world which affects the silver market.

Please feel free to call on us at any time for information or advice. We have a large amount of statistical data and other services which are entirely at your disposal.

We appreciate the confidence that you have placed in us and assure you that we will be at your service at all times.

We remain,

Yours truly, Louis Martin Company. W. G. Coventry.

[fol. 54] there being enclosed therewith also two confirmation slips each dated December 15, 1933 and addressed to the said Frank Givens at Port Orchard, Washington, one confirming the purchase for the account of the said Frank Givens of one thousand (1,000) ounces of June silver at the price of 47⅜, the second confirming a like purchase of one thousand (1,000) ounces of June silver at the price of 47¼; and there being enclosed further a credit memorandum showing the receipt by the said Louis Martin Company from the said Frank Givens of cash in the amount of Two Hundred ($200.00) Dollars; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

Now, that is Count 1.

All remaining Counts in this indictment allege and charge the same offense. Each Count of the remaining nine Counts charges the same artifice and device to defraud, the only difference being that they allege and set out different letters to other investors at different times. But all charges are based on the same statute, all Counts are based on the same statute. The same scheme, the same artifice to defraud, are alleged in all ten Counts. That in short is a brief description of the charges set forth in this indictment.

Now, in support of the allegations of this indictment, and by way of proof, the Government will prove that sometime and on or about the twenty-second day of March, of 1933 there came into being a corporation, a Washington corpora-
[fol. 55] tion known as the Seattle Metal Exchange. The Government will further prove that that corporation had a capital stock of some one-thousand dollars divided into ten shares having a par value of one-hundred dollars each.

The evidence will further disclose that that corporation was formed by this defendant Pierce Lonergan and one M. M. Goggin, and the evidence will develop that M. M. Goggin is Mr. Lonergan's wife. Their names appeared on the

articles of incorporation as the incorporators of what was known as the Seattle Metal Exchange.

The evidence will further disclose that from the inception of this company early in the spring of 1931 down to about the twentieth day of June of 1933 the Seattle Metal Exchange dealt in contracts which will be referred to hereafter as spot silver contracts. Those are contracts which provided for the immediate delivery of silver itself. The evidence will disclose that they dealt in that type of contracts from March of 1931 down to about June the twentieth of 1933.

The Government will prove that on or about June the twentieth of 1933 this Seattle Metal Exchange commenced to deal in what is termed as futures, that is, contracts for the future delivery of silver. They also commenced to deal in what is known as contracts, sellers' contracts for the future delivery of silver.

The evidence will disclose that at about that same time, namely, of June the twentieth, 1933, there came into being four companies. Those companies were Gill & Company, P. A. Jordan & Company, Pierce Lonergan & Company, and the Louis Martin Company. The evidence will disclose that those companies were instigated, were formed, under the authority and direction of this defendant Pierce Lonergan.

[fol. 56] The evidence will further disclose that, for instance, the Gill & Company was operated by Louis J. Gill, at that time a young law student of Gonzaga University, who was over here commencing in business. The evidence will further disclose that P. A. Jordan Company was operated by one George Goggin, the brother-in-law of this defendant Pierce Lonergan. The evidence will further disclose that this associated company, Pierce Lonergan & Company, was operated, controlled and owned by this defendant Pierce Lonergan. The evidence will further disclose that the Louis Martin & Company, one of these four companies, was operated by one John R. Walsh, who was named in the indictment, but with whom we are not concerned in this case.

The Government's proof will show that these four companies were members of what I have described here as the Seattle Metal Exchange, and that the membership of the Seattle Metal Exchange in handling and dealing in these silver futures contracts was limited to these four com-

es, namely, Gill & Company, the Louis Martin Company, Pierce Lonergan Company, and the P. A. Jordan & pany. The trading on the floor, the evidence will show the trading in these silver futures contracts on the floor hat Seattle Metal Exchange was limited to those four panies, those four companies that were operated and were controlled by this defendant Pierce Lonergan.

he evidence will further disclose that most of the con- ts sold to the investors were contracts for the future de- y of silver, not contracts calling for the immediate de- y then at the time of the execution of the contract, but racts that called for the future delivery of silver.

57] The evidence will disclose that under the rules regulations of this exchange and its associate com- es, there were four delivery months during the year, ely, March, June, September and December. Those the months under which they were to deliver silver er these contracts.

he evidence will further disclose that most of the in- ors, most of the outside investors that invested in silver res contracts bought their contracts through the Louis tin and Company, which I have stated was operated by man John R. Walsh.

he evidence will further disclose that the company that dled the majority of investors' contracts, namely, the is Martin Company, had certain associate brokers in and nd this vicinity, namely, the Norman Edward Company Seattle, the Ray Thompson Company of Tacoma, the ard Billburg Company of Spokane. Those were three e associate brokers of this one company, the Louis Mar- Company, which was one of the four members of the ttle Metal Exchange.

he evidence will disclose further that the trading as I e already stated, participation in any of the floor trad- of the Seattle Metal Exchange, was limited to these four panies. In addition, it was limited to these three or four , Pierce Lonergan, Louis Gill, George Goggin, and John Valsh. Those four men, the Government will prove, did he trading on the floor of the Seattle Metal Exchange.

he evidence will further disclose that at the inception of e four companies, and at the commencement of dealing hat we will term here as silver futures contracts, each of e four companies, Gill & Company, Louis Martin & Com-

[fol. 58] pany, and these other companies that I have named, P. A. Jordan & Company, each of those companies were supposed to have paid in one-thousand dollars capital into this Seattle Metal Exchange. They were also supposed to have paid in the sum of three-hundred dollars each as a special margin. The evidence will further disclose that that totalled some $5200. On theory, that was supposed to be the operating expense, and the source of the operation or costs of operation of those four corporations.

The evidence will further disclose that the rules and regulations of the Seattle Metal Exchange and its members, those four companies, required that when there was a complete transaction, that is, when there was a purchase and a sale of a silver future contract, when that transaction was completed, the customer was supposed to pay the total sum of two dollars and a half in commission. The evidence will disclose that — two dollars and a half that was paid as commissions on the completed transactions, two dollars was paid to the brokerage house, for instance, John R. Walsh, or the company he represented, the Louis Martin Company, as that company's commission for handling and for obtaining the buyer. The evidence will further disclose that on theory fifty cents of that two and a half commission was to go to the Seattle Metal Exchange. That was to be the source in addition to their capital for their operating expense, the salaries on the office expense, and stenographic hire, and so on.

The evidence will further show that the unit of these contracts, that is, silver futures contracts, was in a unit of 500 ounces, that is, there was a contractual unit in all these deal-[fol. 59] ings in futures on that particular margin.

As I have already stated, the Government will prove the majority of these contracts that were made with investors in and around this vicinity, and with those persons with whom dealings were made, was negotiated through Martin and Company. The evidence will disclose that they had a number of salesmen. The evidence will further disclose that some of the rest of these four associate or member brokers of the Seattle Metal Exchange had salesmen, had representatives out in the field.

The evidence in the Government's case will go to the proof that Mr. Lonergan, this defendant, was the man who controlled these four companies, was the man who made these representations through these various salesmen, through these hirelings, through these underlings of his.

The Government will prove among other things, as I have read in the indictment, the Government will prove that acting under Mr. Lonergan's orders, under his authorization, these salesmen in the field represented among other things that the Seattle Metal Exchange and these associate brokers and members of the Seattle Metal Exchange were responsible, that they were financially responsible, that they were able to make delivery of silver under their contracts, that they were capable of giving advice on market conditions, capable of giving these investors suitable advice with regards to these investors. They also represented under instructions and upon the order of this defendant Pierce Lonergan that this Seattle Metal Exchange was one of the world markets, [fol. 60] that it was functioning in conjunction with the other world markets, namely, New York, London, Bombay, and Shanghai.

It was further represented upon the authorization of this man standing behind this thing as a principal, that in the event of a market break, in the event of the lowering of prices in this market, in the event of a break in this market, that the other world markets with whom he had made contacts would step in here and stop the crash, that they would take up the slack, that there was no opportunity in this connection of a bad break in the market.

It was further represented to investors in this investment that it was sound, that it was absolutely safe, that there was no possibility of silver going down.

The evidence will further disclose that representations were made by these representatives and salesmen acting under the orders and authorization of this defendant Pierce Lonergan, that all moneys that were paid in by the investors were held in a trust account, or was held in what will be termed here as a clearing house account. That those funds were kept intact, that they were held there for the purpose of buying silver so these companies could deliver to the investor when those contracts became due, when those delivery dates came around, they could make delivery of the silver.

The Government's evidence will show that all these representations, together with those that are added in this indictment were false and untrue. The evidence will show that this Seattle Metal Exchange was not financially responsible. [fol. 61] The evidence will show that it was not capable of extending advice to these investors. The evidence will show

that this Seattle Metal Exchange had no connection, had made no contract with the other world markets, namely, New York, London, Bombay, and Shanghai. The evidence will further show that no money was kept intact. And in this connection I might state that the margins that were paid in by investors, the Government will show that that was not kept intact. The evidence will show that this defendant Pierce Lonergan drew against that account, that office expense, the stenographic hire, was paid out of those amounts. The evidence will show that he dealt in Shanghai dollars out of the funds in this account. The evidence will show that that representation that these funds were kept intact as against a future delivery of silver was absolutely false and untrue, that the whole amount was dissipated.

The evidence will further disclose that during the operation of this company, namely, from sometime during the month of June of 1933 to the crash of July in 1934, a total of some $56,000 was paid in by investors as margins on these silver futures contracts. The evidence will show that that entire $56,000 was dissipated, dissipated by this defendant Pierce Lonergan.

The evidence will show that this investment was not safe. The evidence will show that some of these salesmen even represented to these investors that they would guarantee these accounts. The evidence will show that there was absolutely nothing behind these guarantees. The evidence will show that those representations made with regard to the safety of this particular investment was absolutely false and untrue.

[fol. 62] The Government's case will further show that sometime during the Spring of 1934, an act known as the Silver Purchase Act, was passed by the Congress of the United States. This Act became effective sometime during the year of 1934. The evidence of the Government will prove that in accordance with the terms of that Act the President of the United States was given power to take up the silver market and stabilize the silver market. The evidence will show that acting in pursuance of that authority, and sometime on or about the 9th day of August of 1934, the president of the United States acted through his duly authorized agents, they did take up the silver market, the market was stabilized, and the silver was purchased at 51 cents per ounce.

The evidence will show that this defendant Pierce Lonergan acting on that rumor, and knowing that he had no margin, that he had no account covering this margin account, knowing he could not cover these contracts, that he could not make delivery when these contracts became due, the evidence will show that on or about the 27th day of July of 1934 he made large offers of silver futures contracts in his local exchange down here. The evidence will further show that the rumor emanated from this defendant Pierce Lonergan that there was a concern in California which offered two-hundred thousand ounces in the market for sale.

The evidence will show that the trading on that floor was limited to himself and his cohorts, his relative, his brother-in-law here, and some of these young people. The evidence will show that on the 27th day of July, 1934, he proceeded to break that market.

[fol. 63] The evidence will show that when this thing started in, they were requiring some twelve cents an ounce as margin from each of these investors, twelve cents an ounce on each of these contracts. The evidence will show that that margin was reduced from that to first ten, and then down to six. In other words, an investor, in order to buy the silver future contract, only had to deposit six cents an ounce, and he could own a silver future contract. The evidence will show that that reduction was made during the summer of 1934.

The evidence will show that when he threw that silver on the market, and all these silver futures contracts, he proceeded to break the market here. He drove it down three cents, three cents an ounce on that first day, the 27th day of July, 1934. The evidence will show that on the following market day, namely, the 30th day of July, 1934, more silver was offered, the Government will prove that this was offered through this man Lonergan. The evidence will show that that market broke on that day. The evidence will show that all margins of these various investors were wiped out completely, this six cents an ounce. The evidence will show that this whole thing was brought about by this defendant Lonergan.

The evidence will further disclose that the books of these corporations, and the books of these corporations will disclose that some thirty-eight per cent of the transactions

as shown on those books as carried on the board in that Seattle Metal Exchange were carried on through dummies, through fictitious persons, through names which are referred to in the vernacular of brokerage houses as "street" names.

[fol. 64] The Government will show he was on that last day's down, and he was selling himself. The evidence will show that all through these transactions, he was the one, he was the principle one, that will be shown and will be evidenced by their own books, will show that he was the one that was selling short on these markets. In other words, these investors, acting on the representations promulgated by this Pierce Lonergan, purchased silver futures contracts, purchased silver for future delivery in months stated; that evidence will prove that this man Pierce Lonergan, turned around and sold on that same market, sold against those same contracts. The Government will prove that in the final analysis that means but one thing, that he was out representing what a safe thing it was to buy silver in that market, and in the same breath and in his own Seattle Metal Exchange he was selling on the market—which he stated to those people would go up.

The evidence will show that the market closed sometime on or about the 30th day of July. That all the investors, I forget the number, were wiped out, and margins were wiped out, they were closed out of that market. As I stated before, the evidence will disclose there was some $56,000 or $60,000 that was lost to these investors. The evidence will further disclose that not one penny of restitution was made. When an examination was made of the assets of those concerns, of those books, there was no money left, it had all been dissipated, all been used in overhead, all been dissipated by this defendant as margin against those short contracts.

The Government's proof will also extend to the mailing [fol. 65] of the letters, circular letters named in this indictment, and in the various Counts. The Government will prove that they were all mailed in the furtherance and in the execution of this artifice and scheme to defraud, as I have briefly outlined here. That they were all deposited in the Post Office here in the City of Seattle, Washington. That they were all delivered there for the purpose of being

delivered by the Post Office establishment of the United States. That they were all sent out to investors, people who had been persuaded to buy silver future contracts on this market. That they were all sent out in furtherance of this artifice and scheme to defraud.

And, ladies and gentlemen, on the proof of those facts as I have briefly outlined here, the Government expects a verdict of guilty as against this defendant Pierce Lonergan.

The Court: The defendant may make now or reserve until later his opening statement.

Mr. McDonald: The defendant will reserve his statement, Your Honor.

(Jury absent.)

Mr. Luckerath: We simply wanted to ask our exception similar to that which we announded at the end of your opening statement last time, Mr. Hughes. I have before me the transcript of it. I think I will just refer to that and ask the Reporter to incorporate it.

The Court: You may make your motion, whatever it is.

MOTION TO DISMISS, ETC.

Mr. Luckerath: If your Honor please, we move for a dismissal or directed verdict at the conclusion of the state's presentation of their case upon the ground that the opening [fol. 66] statement of the prosecution does not contain sufficient facts stated to constitute a violation of the Act, on the ground that the interchangeable use of the term silver future and silver have been so confused as to prevent a fair trial on the general issues.

Also we have asked that this motion stand on the ground that it has the effect, as does the indictment itself, of placing this defendant under double jeopardy. And we add to that the challenge that the statement discloses no place in it an allegation of proof on the part of the government that Mr. Lonergan in any of these respects acted in fraud or in bad faith.

The Court: The motion is denied.

Mr. McDonald: Exceptions.

The Court: Exception allowed.

Testimony of W. G. COVENTRY, called for the United States

W. G. COVENTRY, a witness called on behalf of the United States, having been first duly sworn, testified as follows:

My name is William George Coventry; residence, Apartment 411, 804 Marion Street, City of Seattle. I am employed broadcasting on KIRO, a local broadcasting station. In the month of July 1934 I was employed by the firm of Louis Martin Company, 211 American Bank Building, Seattle. I received my position from Pierce Lonergan.

(Witness identifies the defendant Pierce Lonergan.)

My employment commenced with Louis Martin Company about September 25, 1933; the head of this company was John R. Walsh. I received orders at times from John R. Walsh and at other times from Pierce Lonergan. Louis Martin Company is engaged in dealing in silver futures and spot silver, which is silver for immediate delivery as [fol. 67] a brokerage business. Louis Martin Company were representatives of the Seattle Metal Exchange; the exchange was situated on the fourth floor of the American Bank Building and was later moved to the ninth floor of the American Bank Building in the City of Seattle. My duties in and around Louis Martin Company in the beginning were merely as an office help; customer's man, to take care of any people who came into the office. Afterwards I was made office manager of Louis Martin Company and had direction of the salesmen going out from that office; received money that came in from salesmen and from some of the associated firms or brokers; I passed that money on to either Mr. Walsh himself or to a stenographer whom he would send down from his office upstairs. My duties did not actually take me to the Seattle Metal Exchange itself. I am acquainted with its makeup and formation from instructions that were given to me by Mr. Lonergan, the defendant in this case. He told me there were four firms of brokers who were members of the Seattle Metal Exchange, namely, Louis Martin Company, P. A. Jordan & Company, Gill & Company, and Pierce Lonergan Company. The head of Louis Martin Company was Mr. John R. Walsh; the head of P. A. Jordan Company was Mr. George Goggin, and the head of Gill & Company was Louis Gill; Mr. Pierce Lonergan was at the head of Pierce Lonergan

Company. George M. Goggin is a brother-in-law of Mr. Lonergan; Louis Gill is a youngster from Spokane and John R. Walsh came from Port Orchard where he was employed in the bank.

Mr. Lonergan was at the head of the Seattle Metal Exchange. The four companies were members of the Seattle Metal Exchange; the firm of Louis Martin Company had associate brokers and I am not sure about the other firms. [fol. 68] The associate brokers of Louis Martin Company were Norman Edward Company, who had offices in the Insurance Building on Second and Madison in Seattle. Ray Thompson Company, in the Fidelity Building in Tacoma. Edward Billberg and Company over in Spokane, and one correspondent broker in Port Townsend, whose name I am not absolutely certain of. These were all members of the Seattle Metal Exchange.

The trading on the floor of the Seattle Metal Exchange as related to me by Mr. Lonergan was confined to the member brokers—no other person was allowed to participate in the trading. For every contract that was bought through a broker on the floor of their exchange, there had to be a seller, that is, another broker found someone who was willing to sell the amount of silver that the buyer wished to buy. The trading was limited entirely to the four broker members of the Seattle Metal Exchange. These four companies were represented on the floor of the Seattle Metal Exchange, when they were present in the city, by: Mr. Lonergan representing Pierce Lonergan & Company; Mr. Walsh representing Louis Martin Company; Mr. Goggin representing P. A. Jordan Company, and by Louis Gill representing Gill & Company. No other persons were admitted to the floor of the Seattle Metal Exchange for trading purposes except those people.

These statements made by Mr. Lonergan were made during the first three or four days after I joined. There were many meetings held, usually in 204 American Bank Building, which was the office of Gill & Company. I was in attendance at nearly every meeting; these meetings were attended by the salesmen of all the brokerage firms that were employed at that time, together with the four members, [fol. 69] when they were present in the city and not otherwise engaged, and occasionally by Ray Thompson and Arthur Pritchard of Tacoma, and I believe once Mr. Billberg of

Spokane was present. The salesmen or representatives employed by Louis Martin Company differed at times; it ranged from two to about six; they were usually present at these meetings; Mr. Lonergan was usually present. I cannot remember all the salesmen who were present at all the meetings because the meetings took place so frequently, at different times, that is. Present at the meetings were Norman Coles, who in the beginning was a salesman and then ran the firm of Norman Edward Company; W. R. McKnight, George Hughbanks, Art Linman, Art Sternoff, Robert Lonergan, a salesman, no relative I believe to the defendant; Mr. Bratsburg, and there were many salesmen present at different times from Norman Edward Company, whose names I cannot recall at present. Norman Coles in the beginning was a salesman employed by Louis Martin Company; somewhere after January 1, 1934 he became associate broker of Louis Martin Company and took over offices in the Insurance Building under the name of Norman Edward Company.

At these meetings there were general pep talks, explanations that any of the salesmen asked for in regard to what the silver markets were doing; explanations as to how investments in silver were made, and how the money, when it was paid in to the salesmen, where it went and what happened to it; and in regard to the general business of the brokerage firms. The business of the salesmen was to contact the general public from either lists given by Mr. Walsh and Mr. Lonergan to me for them, or directly to them, and to contact anyone that they possibly could in the [fol. 70] general course of a salesman's business, with the idea of purchasing silver futures or silver bullion, acting under my supervision and under the direction of Mr. Lonergan. At different times different salesmen were put in charge of the meetings by Mr. Lonergan. Instructions and directions were given by the chairman at the time, and various people gave talks there. The chairman who was presiding was the general talker for the day. Questions were asked by the people present; they were answered in nearly all cases by Mr. Lonergan. Instructions were given there with reference to sales by Mr. Lonergan; the instructions that Mr. Lonergan gave the salesmen or agents or representatives of these various companies in the beginning were very simple, in that they concerned, to a new salesman,

what a silver future contract was. Then they would go on to say how the silver future contracts were handled and then how the money was handled. Mr. Lonergan stated a silver future contract was a contract to purchase silver at some definite future month, entered into by one party to buy and by another party to sell. The date at which this contract was taken up in the definite future month was at the seller's option; any time during the month stated the seller could call upon the purchaser to take up that contract. Explanations of what a silver futures contract was were made to investors in my presence on at least four occasions; there were many more— I have forgotten.

The other world exchanges are New York, Shanghai, Bombay and London, England. At these meetings Mr. Lonergan made statements with regard to all the silver trading centers of the world. Statements regarding the London market were nothing much of importance, except to show [fol. 71] that considerable interest centered in London as a silver market. The New York market was explained a bit more fully. We were told that silver being a world commodity, that New York naturally would support the Seattle market in case any break occurred in the Seattle market; that Shanghai, between which two, Shanghai and New York, Seattle is geographically placed, would also support the Seattle market in case of any break in the Seattle market, just as it was possible for Shanghai to support the London market or the New York market in case of any break. That all silver investors, broker, would be able to prevent any world-wide break in any one place by supporting that place. We were informed on many occasions that it would be impossible for silver to break on the Seattle Metal Exchange because Shanghai and New York would come to the support of that market; that is, seize the opportunity to step into the market and to buy silver below the world market prices if the silver on the Seattle Metal Exchange ever got below the world market prices, which was unlikely.

Mr. Lonergan stated and represented with reference to connections he had with the other world markets, that he had an evening session of the Seattle Metal Exchange in order to send quotations out to Shanghai. The difference in the time between Seattle and Shanghai is approximately four hours I believe and, therefore, by holding an evening

market we were open at the same time that Shanghai was open on the following morning, and we sent quotations on the Seattle Metal Exchange to the Shanghai market, one of the brokers, I believe, in Shanghai. We also received the quotations from the New York silver market, that is [fol. 72] from the New York Commodity Exchange on which silver is traded. My actual connections with silver futures began with my joining the firm of Louis Martin Company. My stock market experience has been a little investment on my own behalf at times and on behalf of my mother-in-law. When I referred to a break in the silver market I meant there would be a falling away from those quotations of the past two or three days in its trend. Quotations from this market were furnished to Shanghai and the local newspapers. I know of no connections that this Seattle Exchange had with the world markets except for the fact that Mr. Lonergan had told me that a certain amount of trading was done by the Shanghai market on the Seattle Metal Exchange. The other world markets never stepped in on this Seattle Metal Exchange when a break did occur in this market, to my knowledge. The representations which were made to salesmen and representatives of these companies were made by Mr. Lonergan to investors in my presence. Mr. Lonergan was always very optimistic about the future of silver in his talks to the salesmen, to me and to the investors. He always predicted that silver had a great future before it in that something was going to be done by the administration for silver to raise the price; that we had numerous charts to show that when times are good, that is for everyone, the price of silver goes up, in fact it leads the way up. When times are bad it will show you that times are going to become bad by leading the way down. He often said it was an extremely good barometer of world conditions, not national, but world conditions. Mr. Lonergan stated to me and to the salesmen in my presence that he was an expert on silver and silver future contracts; he [fol. 73] stated, I think always he prefaced in his opinion that the market would go up. I think he always prefaced his remarks that it was his opinion that the market would go up. In the beginning when I first joined the firm the statements made by Mr. Lonergan to me personally and afterwards in the presence of salesmen and investors were to the effect that there was a requirement of a minimum

of six cents an ounce on each contract required to be maintained by the exchange; that the broker required an initial payment of ten cents an ounce, which left four cents an ounce leeway. In January, I believe it was, of 1934—it may have been December—the margin was changed; then we required eight cents minimum on the exchange and a twelve cent initial deposit was required—that is twelve cents an ounce. Later in June 1934, the margin was changed again and it was brought from eight cents minimum on the exchange down to four cents an ounce, with an initial margin requirement of six cents an ounce. I think it was about the end of June—maybe the beginning of June 1934—when the margin was cut to six cents an office—the initial margin—but the margin required by the exchange was cut to four cents an ounce. The Margin of twelve or ten or six cents an ounce was required from the investor in a silver future contract. I handled quite a considerable amount of money by reason of my duties with Louis Martin Company. The money came from the salesmen, that is the salesmen got it from the investors; the salesmen would then bring it to me, that is if he was either a salesman of Louis Martin Company, or if he was an associate broker, Most of them—usually the associate brokers of Louis Martin Company—sent their money to me in the office as well. I then issued a receipt, [fol. 74] an ordinary stub book receipt to the salesman or the associate broker—that was done as a temporary receipt. I would then ring up Mr. Walsh—he was either upstairs on the fourth floor or on the ninth floor when the exchange later moved to the ninth floor—and he would either come down himself to get the money or he would send a stenographer down within a short while to bring the money upstairs for safety, because where we didn't really fear a holdup in 211 American Bank Building in the office, at the same time it was no safe place to keep the money down there. The way the money was handled, according to what Mr. Lonergan told me and many salesmen and investors in my presence, was to the effect that every day at 2:30 P. M. every brokerage house had to put up with the clearing house of the exchange sufficient money to cover the contracts that they had purchased on the exchange that day. That is, the initial payments required; that the money was then put into an escrow account, together with the money which was put up with the seller, because for each contract

that was bought there had to be someone to sell it. Mr. Lonergan explained on many occasions that when the buyer put up an initial amount of money, the seller had to put up an equal amount as well, or the silver in kind. These two amounts were then held by the clearing house in escrow in a trust fund; they could not be touched, taken out of that trust fund by anyone until the contract was completed. Mr. Lonergan explained that the exchange merely acted as an agent, as it were, until the deal was completed; that is the actual duty of an exchange—it is merely to act as an agent so as to watch over the contract and keep it there until that contract is completed.

[fol. 75] This trust fund was designated a clearing house fund in the books regarding the company, that is regarding the clearing house. Mr. Lonergan made this representation with regard to a clearing house fund or a trust deed fund of margins to investors in my presence.

The units of these contracts in futures were 500 ounces; a 500 ounce contract was explained by Mr. Lonergan to be one of the most useful assets of the Seattle Metal Exchange, insomuch that New York, if you invested there, you either invested in units of 25,000 or 50,000 ounces, depending upon whether you were buying future or spot silver, and therefore it became in New York a rich man's investment. And, therefore, by opening up to the public silver futures as an investment in small lots of 500 ounces, we were doing a great service, because on a 500 ounce contract, when I first joined, only ten cents margin was required, costing an investor exactly $50.00 as an original investment.

In June the margin was reduced to about four cents an ounce minimum on the exchange. The investor would have to deposit an initial deposit of thirty dollars. Buyers' contracts came through my hands by reason of my employment with the Louis Martin Company, that is the original contracts that I had were nearly and practically all buyers. I think that I may have received during the year I was with the firm not more than five contracts for short selling, that is people who had not got the silver, but who put up, were ready to believe that silver was going down and therefore they put up their margin as an investment, that silver was going down. Practically all of the contracts I handled were buyers' contracts.

[fol. 76] I handled most of the contracts for Norman Edward Company, and contracts from Ray Thompson were usually 'phoned in to me. Occasionally they went direct to Mr. Walsh but usually they were phoned in to me and then afterward confirmed in writing; and also the Port Townsend, I have forgotten, I think it was Mr. Welch, was up from Port Townsend, but two contracts were bought on behalf of this man from Port Townsend; they were also handled by me. I was familiar with the rules and regulations of the Seattle Metal Exchange with reference to the commissions on these contracts, commissions to the salesmen and brokerage houses. Contracts were for the purpose of future delivery of silver; the commission was on each contract on the round turn, that is on the buying and the selling it was $2.50 per contract. Commission was paid by the customer in addition to the margin deposited by him; it was paid at the conclusion of the contract, when the purchaser either took up his option, he took up his contract and paid the remainder of the balance due, or when he sold his contract, that is, the completion of it, fifty cents, I believe, went to the Seattle Metal Exchange and Louis Martin Company paid its salesmen two dollars of the remaining two dollars.

The Seattle Metal Exchange was under the control of the governors of the Seattle Metal Exchange. I know two members of the governors of the Seattle Metal Exchange, that is all. Mr. Pierce Lonergan was president and Mr. John R. Walsh was treasurer. Mr. Lonergan was president of the Pierce Lonergan Company; he was president of the Seattle Metal Exchange, of the board of governors also. Mr. Walsh was president of the Louis Martin Company; he [fol. 77] was also the treasurer of the Seattle Metal Exchange; he largely had control, at least the control of the books, but he tried to keep the accounts, I believe, of the Seattle Metal Exchange; he was under the control, supervision and direction of Mr. Lonergan. I did not say that Mr. Louis Gill was a member of the Board of Governors; Mr. Gill owned a membership in the Seattle Metal Exchange in the name of Gill & Company.

I have seen a book entitled "Manual of the Seattle Metal Exchange", in the offices of Pierce Lonergan; the offices of Gill & Company and the offices of Louis Martin Company.

(Plaintiff's Exhibit No. 1.)

The manual was issued to people who came into the offices to inquire regarding silver futures and silver as an investment, to new customers and to prospects.

The pamphlet entitled "Silver" I have seen in the offices of Pierce Lonergan, Gill & Company and Louis Martin Company between September 1933 and July 1934. This pamphlet was given to people who came into the office inquiring about silver—I mean prospective customers and investors.

[fol. 78] Plaintiff's Exhibit No. 3, received in evidence, one of which is identical with Exhibit No. 52, later admitted.

Between the first week of October, 1933, and the end of December, 1933, I compiled the market letters under the direction of Mr. Lonergan—under his supervision. They were mailed under the direction of Mr. Lonergan and under the supervision of the various brokers, to customers and to prospective customers. This portion of a letter (Government's Exhibit No. 4) I have seen in the offices of Louis [fol. 79] Martin Company in the first two or three months of 1934. I am not certain by whom it was compiled—it was mailed to prospective customers.

The file of clippings (Government Exhibit No. 5), I have seen in the offices of Louis Martin Company between October 1933 and July, August 1934; they were compiled by me or under my direction and consisted of clippings taken from the newspapers placed in there by brokerage houses; most of them under the direction of Mr. Lonergan; some of those advertisements were compiled by me under the direction of Mr. Lonergan.

Mr. Hughes: I offer at this time what has been marked for identification as Government's Exhibit No. 5.

The Court: Admitted.

(Newspaper clippings received in evidence as Plaintiff's Exhibit No. 5.)

Witness (continuing): In the Seattle Metal Exchange the months of delivery were March, June, September and December. It was the sellers' right to call upon the purchaser, the buyer, to conclude the contract at any time during the month stated at the seller's option. That is, any day during that month which the seller wished; and then the purchaser of the contract, buyer, had to either

put up the balance of the money, because when he entered into the contract, he entered into it at a stipulated price. That is, you might today enter into a contract to buy silver next December but the price at which you would buy it would be stipulated in your contract today; then when the time came in December, the buyer either put up the balance of the money in order to take up the contract, and the seller [fol. 80] would have to put up the silver, deliver the silver to the buyer, or the buyer would have his contract sold by the broker, by his broker on the floor of the Seattle Metal Exchange.

Q. Now, directing your attention to on or about the 27th day of July 1934, I will ask you what occurred at the Seattle Metal Exchange on that date, if you know?

A. The market dropped about three cents.

Mr. McDonald: I object to that and move it be stricken as not responsive, Your Honor.

The Court: Objection overruled.

Mr. McDonald: Exception.

The Court: Exception allowed.

Q. And I will ask you whether you had conversations, or whether Mr. Lonergan made statements in your presence with reference to this drop in the market?

A. Yes.

Q. And what were those statements?

A. That a California syndicate who had purchased a considerable amount of silver through the firm of P. A. Jordan & Company had got tired of holding this silver, they thought the investment had not increased in value sufficiently rapidly, and had that morning dumped two-hundred thousand ounces of silver on the market to be sold.

Mr. McDonald: Just a moment. Right there, Your Honor, I want to interpose an objection, and that is that that last answer be stricken on the ground and for the reason, if Your Honor has read this indictment and [fol. 81] analyzed it, there is a scheme charged here to depress the market in silver futures. Now, it is readily apparent that this is quite a different thing from the silver market. In other words. Spot transactions in silver are one thing, and contracts are another. And the indictment alleges that the scheme was——

The Court (interposing): I have in mind the point that you are bringing out. You may state your position.

Mr. McDonald: The point is that the scheme there described was that they were to accomplish this end by breaking the market in silver futures contracts. Now, I have many authorities here from the Supreme Court of the United States and the Federal Circuit Court of Appeal, that you can't charge—of course, that is elementary, you can't bring a man into court on one charge and prove another. And it is highly prejudicial if we have to face that thing. And I am just as confident as I am standing in this courtroom that I am absolutely right on it. And I would like to have a chance to present it to the Court.

The Court: Have you any response?

Mr. McDonald: It is not the same thing as raised by the demurrer, that is a different point. I am very positive of this point. The demurrer I was not so sure.

Mr. Hughes: If your Honor please, I would like to have that answer read. I believe that the answer was limited by a statement made by——

Mr. McDonald: If the Court please, just before you do that, co-counsel called my attention that I misspoke myself, I got the converse. The indictment alleges a scheme to break the silver market. And this evidence goes to the [fol. 82] other proposition of interferring with the future contracts market. I just want the record to show that I misspoke myself.

(The last previous question and answer read.)

By Mr. Hughes:

Q. Mr. Coventry, I will ask you whether Mr. Lonergan stated whether or not the silver that was dumped, as you say, by the California Investors, was spot silver or in futures?

A. Silver futures.

Mr. McDonald: Now, that is the precise point, Your Honor.

The Court: Your objection goes to both questions and both answers?

Mr. McDonald: One only, Your Honor.

The Court: I won't attempt further to explain it. I understand your objection went to the questions before your

objection, and to the answer before your objection, and also to the question next after your objection, and to the answer made thereto.

Mr. McDonald: Yes, Your Honor, as far as the silver futures is concerned—I should say the silver bullion.

The Court: Now you say you are requesting time to argue this matter, is that what you said?

Mr. McDonald: I am prepared to.

The Court: I think the court is sufficiently advised to rule upon it.

Mr. McDonald: I would like the record to show that I rely on the case of Bell vs. U. S., in 196 U. S. 238; also ex parte Bain 121 U. S. 1; Maynard vs. U. S. 12 Federal 2nd 226; Gilbert vs. U. S. 288 Federal 731; U. S. vs. Lawson, 13 Federal Supplement 178; Rivers, 146 Federal 978, being Circuit Court of Appeal; Maftzger vs. U. S., 200 Federal 4,92.

[fol. 83] The Court: The objection is overruled.

Mr. McDonald: Exception, Your Honor.

The Court: Exception allowed.

By Mr. Hughes:

Mr. Coventry, I will ask you whether Mr. Lonergan stated anything further with reference to this break of three cents in the market on that 27th day of July, 1934?

Mr. McDonald: If your Honor please, may we have a stipulation that all this line of questioning goes in under my objection, so that I won't have to be making it to every question?

Mr. Hughes: I so stipulate.

The Court: Very well.

The Witness: Would you mind repeating the question?

Mr. Hughes: That is, just a moment—this stipulation is that you object, the objection and the grounds stated will run to all this following testimony on the ground that this particular thing——

Mr. McDonald: Yes, I would just as soon get it clear——

The Court: What counsel means, he wishes it understood without having each time to repeat his objection, he wishes his objection to run to all this line of testimony.

Mr. Hughes: The same objection, the same ruling?

Mr. McDonald: The scheme laid in this indictment.

Mr. Hughes: No objection to that. It is so stipulated.

Witness (continuing): In and around the offices of Louis Martin Company during the day of July 27, 1934 there was considerable agitation caused when the Seattle Silver mar-
[fol. 84] ket broke—agitation to the salesmen, associated brokers and investors. The salesmen together with the associated brokers got together in the office of Louis Martin Company; they were there on Friday and they met again on Saturday, when there was no trading; the market was closed on Saturday, being a summer month—that was July 28. There was Ray Thompson, Arthur Pritchard, Norman Coles, Arthur Linman, Art Sternoff, and others were coming in there.

At these meetings we talked things over pretty thoroughly and it was then decided that if we could close the market, get the Board of Governors of the Seattle Metal Exchange to close the market for three days, that we would go out and attempt to find sufficient customers, new buyers, to take up the two-hundred thousand ounces of silver. If we could have found buyers to have taken up the two hundred — ounces that were being offered there would have been no break in the market at all, that is no further break. That two-hundred — ounces were being offered by the California syndicate, we heard direct from Mr. Lonergan and Mr. Walsh then confirmed it.

On Saturday, July 30, 1934, a petition was got up signed by the associate brokers asking the Governors of the Seattle Metal Exchange to close the exchange for three days. I helped to type it; it was unanimously decided upon at that meeting. I assisted in drawing up this resolution; to the best of my memory Mr. Coles and Mr. Thompson took the resolution out of the office to take it to Mr. Lonergan as president of the Board of Governors.

(Plaintiff's Exhibit No. 9, copy of the resolution, received in evidence.)

[fol. 85] I saw Mr. Lonergan afterwards but I did not speak to him about the resolution. The days in which the Seattle Metal Exchange was open and doing business was from Monday to Friday; there was no trading Saturday and Sunday. I 'phoned Colonel Perkins, president of the Seattle Mining Exchange before the preparation of the resolution. I cannot recall any conversations with Mr. Lonergan on July 27 or 28. I advised Mr. Lonergan that it was impossible for anyone to sue the brokers because

the governors of the Seattle Metal Exchange, Board of Governors, had closed it. He merely brushed aside the information. Mr. Lonergan was absolutely insistent that the market had to remain open on Monday, no argument or anything else would stop that market from being opened on Monday. On Monday, July 30, 1934, the market dropped to approximately its limit of three cents below its previous trading day's low. Occasionally, very occasionally, the spot silver would be dealt in. I cannot give the approximate ratio—it was very small. The Seattle Metal Exchange had adopted the same rule that was in force in the New York market, that is that any one day's trading was limited to a rise of three cents above the previous day's high and three cents below the previous trading day's low. The complete drop in the market during the dates of July 27 and July 30, 1934 with reference to the closing price on the evening of July 26 was approximately six cents. On July 31 the market dropped again and many customers were sold out, that is their margin was said to have been wiped out. That is, the money they had put up was said to have been wiped out by the fall of the price of the silver futures on the Seattle market. And therefore they had to be sold [fol. 86] out because they hadn't got any margin up against the purchase of their contract; they lost their money. I had several conversations with Mr. Lonergan to the effect that the price on the Seattle market was well below the New York market. To the best of my knowledge the New York market rose during the three days the Seattle market was dropping. Mr. Lonergan said he was endeavoring to get the Shanghai market to step in and buy out the two-hundred thousand ounces of silver that was being offered. Louis Martin and Company on Friday sent telegrams to investors. Telegrams were sent to every single investor to the best of my knowledge.

(Telegram received in evidence as Plaintiff's Exhibit No. 10.)

This telegram is the telegram, or at least one of the telegrams, sent out. This telegram was handed to me by my mother-in-law, Mrs. Lillian J. Lyman. I did not see this telegram in the offices of Louis Martin and Company; I saw this telegram on Friday, July 27; it is a form of a telegram sent out from the offices of Louis Martin Company on that occasion.

Mr. Hughes: I am offering what has been marked for identification as Government's Exhibit No. 10.

The Court: It is admitted.

Mr. McDonald: I object on the further ground there is no showing Mrs. Lyman ever received it.

Mr. Hughes: This isn't one of the indictment—this has nothing to do with one of the indictment——

[fol. 87] The Court: Objection overruled. Exception allowed.

Mr. McDonald: Exception.

The Court: You may read the telegram.

Mr. Hughes: "Seattle Wash. 424 P. July 27, 1934 Mrs. Lillian J. Lyman Personal Assembly Hotel Seattle Wash. The security is impaired upon your contract for the purchase of five December silver stop Unless we are further guaranteed the performance of your contract by deposit of three hundred seventy five dollars by ten thirty a. m. Monday July thirtieth nineteen hundred and thirty four we will be compelled to liquidate your account by the sale at market of the silver contracted by you Louis Martin Co."

Witness (continuing): This exhibit is a file of the trading in New York futures.

(Plaintiff's Exhibit No. 8 received in evidence.) File of trading in New York Futures.

It was compiled by me or one of the stenographers under the orders of Mr. Lonergan when I first went into the office. The New York quotations included therein were from quotations sent down from the exchange. They were compiled as a result of the quotations that come in on a ticker service from New York. The quotations in the beginning, I believe, were compiled as a result of telegrams which came in, giving the quotations; it was either every half hour or every hour on the New York market. During the whole time I was with the office that was the procedure. The ticker service and telegram service was maintained by the Seattle Metal Exchange—or I am not positively certain [fol. 88] that it was maintained by the Seattle Metal Exchange, it may have been maintained by Pierce Lonergan Company, but they were kept in the due course of business.

Q. Handing you what has been marked for identification as Plaintiff's Exhibit No. 11, I will ask you to state what that is, if you know?

A. It is a letter of Louis Martin Company.
Q. And it bears whose signature, if you know?
A. Mr. J. R. Walsh's.
Q. And are you familiar with that signature?
A. Yes.
Q. And where have you seen that letter before?
A. Mrs. Lillian J. Lyman.
Q. And if you will peruse that letter, and state whether or not that is a form letter.
A. This is a form letter.
Q. And you have seen that form before?
A. I have.
Q. And how many letters were prepared and compiled following that same form?
A. The exact number I cannot say, but I have seen at least a dozen of them brought in by different people.
Q. Who is Mrs. Lillian J. Lyman?
A. She is my mother-in-law.
Q. She resides where?
A. At the Assembly Hotel in Seattle.
Q. You reside at the same address?
A. No.
[fol. 89] Q. What is her present physical condition, if you know?
A. She is——

Mr. McDonald: Objected to as immaterial, if Your Honor please.
The Court: Objection overruled.
Mr. McDonald: Exception.
The Court: Exception allowed.

A. She is in the hands of a doctor. She is between 70 and 80 years old, very sick, and unable to withstand any shock or excit-ment at all.
Q. Is she able to be down here and testify as a witness?
A. No, she is not.

Mr. Hughes: I might point out, if Your Honor please, that this is an indictment letter upon which Count 6 is based, predic-ted. I now offer the same, and what has been marked for identification as Plaintiff's Exhibit No. 11, into evidence.

Mr. McDonald: Objected to as not having been sufficiently identified, and hearsay.

The Court: You might ask him if the letter was sent, if he knows, to the addressee.

By Mr. Hughes:

Q. I will ask you whether or not this letter was mailed, if you know?

A. I don't know that that exact letter was mailed.

Q. Were any letters of this identical form mailed?

A. All of them.

Q. Mailed by whom in that office?

A. By Louis Martin Company.

[fol. 90] Q. And which particular employe mailed the letters, if you know?

A. I do not know.

Q. Sent in the due course of business?

A. In due course of business.

Q. The other portion of that exhibit is what, if you know?

A. That is a special delivery stamp on the letter addressed to Mrs. Lillian J. Lyman, carrying the address of the sender as the American Bank Building, Seattle, Washington.

Q. Have you ever seen that envelope before?

A. Yes. The whole thing was handed intact to me by Mrs. Lyman; in fact it was opened in my presence.

Q. Where?

A. In the Assembly Hotel.

Q. Do you recognize that as being the envelope from which that letter was taken?

A. I do.

Mr. Hughes: I renew the offer, if Your Honor please.

Mr. McDonald: I object on the same grounds.

The Court: Were you working for Louis Martin Company at the time this letter was supposed to have been mailed?

The Witness: I was, Your Honor.

The Court: How many people were working in there who might personally have mailed this letter?

The Witness: There were three stenographers, Your Honor, and Mr. Walsh, were the only four people, I think, [fol. 91] who could have possibly mailed that letter, unless one of the other brokers assisted Louis Martin Company at the time. I don't know that.

Mr. Hughes: If the Court please, if there is any question about this letter, I will withhold it at this time and identify it further later on.

The Court: The Court reserves ruling.

Mr. Hughes (addressing the Clerk): If you will hold that as you are holding No. 7.

The Court (continuing): Giving counsel liberty to introduce further proof.

Q. Handing you what has been marked for identification as Government's Exhibit No. 12, I will ask you to state what that exhibit is, if you know?

A. It is a letter of Louis Martin Company.

Q. And have you seen that form of letter before?

A. Yes.

Q. Where?

A. In the offices of Louis Martin Company, and in the Assembly Hotel, in the room of Mrs. Lillian J. Lyman.

Q. Where did you see that particular letter in the Assembly Hotel, in the possession of whom?

A. Mrs. Lyman.

Q. The letter is addressed to whom?

A. Mrs. Lillian J. Lyman.

Q. I will ask you whether or not you ever saw the second [fol. 92] portion of that exhibit which is attached to the main portion?

A. Yes.

Q. Where?

A. In the Assembly Hotel.

Q. And the last portion of the last portion of that identification?

A. Yes.

Q. Where did you see that?

A. In the Assembly Hotel.

Q. And what is that?

A. The last portion is the——

Q. Not that, the——

A. The envelope, that is what they call, I think what is known as a window frame envelope.

Q. And have you ever seen that envelope before?

A. I can't identify this envelope, no, because there is no writing on it at all, but I have seen a similar one if not that one.

Q. Mrs. Lyman is your mother-in-law?

A. Mrs. Lyman is my mother-in-law.

Q. And can you say whether or not this letter was mailed by Louis Martin Company?

A. Not of my direct knowledge.

Q. Were there a number of letters of this same type that were sent out, containing the same information, sent out?

A. Yes.

Q. Can you say what number?

A. No.

[fol. 93] Q. Sent out about the same time?

A. At the same time.

Mr. Hughes: I will withhold this, if Your Honor please, too, for further identification.

By Mr. Hughes:

Q. Mr. Coventry, this morning you outlined facts with regard to the status of John R. Walsh. I will ask you whether or not John R. Walsh ever stated his status with the Seattle Metal Exchange or the Louis Martin Company?

Mr. McDonald: Just a moment.

Q. During the period stated in the indictment.

Mr. McDonald: I object, Your Honor, on the ground that there is no showing that Mr. Lonergan was present.

The Court: Do you wish to make any response to counsel's objection?

Mr. Hughes: Well, if the Court please, I am urging the same points that were urged before.

The Court: That is not in this record.

Mr. Hughes: I have sent for citations. I think, perhaps, that whatever argument is made here should be made in the absence of the jury, as it was before.

(Jury absent.)

(Argument.)

The Court: The Court is ready to rule upon it, and the objections made will be overruled.

Mr. McDonald: May the record show, Your Honor, that we predicate our position in this under the authority of Carson vs. U. S., 25 Federal 2nd 49, the particular point being discussed at page 55. Also Gold vs. U. S., 36 Federal 2nd page 16. And Van Roper vs. U. S., 13 Federal 2nd, [fol. 94] 967.

The Court: Recall the jury.

Mr. McDonald: And the Court will allow us an exception to the ruling?

The Court: I am going to make it in the presence of the jury.

(Jury present.)

(The last question is read.)

The Court: The objection is overruled. The answer should be yes or no.

Mr. McDonald: Exception.

The Court: Exception allowed.

By Mr. Hughes:

Q. Will you answer that question yes or no?

A. Yes.

Q. And what did Mr. Walsh state?

A. Mr. Walsh told me that his whole position was under the control and direction of Mr. Lonergan, that every action he undertook he did so under the direction of Mr. Lonergan, even in connection with the affairs connected with Louis Martin Company, of which he was president.

Mr. McDonald: Just a moment, counsel. At this time, Your Honor, I move to strike the last answer as being an improper answer, in that it is no statement made in the furtherance of any conspiracy but merely is a narrative of a past event, and as such not within the rule which admits statements made by one defendant or co-conspirator in the absence of another, the exception to that general rule. I move that it be stricken, and the jury be instructed to disregard it.

[fol. 95] The Court: The motion is denied. Exception allowed.

By Mr. Hughes:

Q. Mr. Coventry, do you recall the approximate date on which Mr. John R. Walsh made this statement?

A. It was somewhere in April of 1934, as far as I can recollect.

Q. And was that before the break in the market?

A. Yes.

Witness (continuing): I invested money on behalf of my father in the Seattle Silver Market, and I had received

from him an authorization to buy and sell on his behalf. I invested that money in silver futures. There were two amounts, one of which was drawn down, approximately Three Hundred Dollars, and the other of which was in standing at the time the exchange closed, also Three Hundred Dollars. In investing this money I acted on Mr. Lonergan's representations. The results to the investments made on my behalf and on the behalf of others, in the course of July 27 to July 30, was one of those cases where no notification has ever been received by me, or to the best of my knowledge, by my father, that his account was sold out—in fact the account as far as I know is still open, although the maturity date has passed.

Mr. Lonergan did not state to me anything with regard to a bank deposit containing margins. He stated that silver and silver futures on the Seattle Exchange were sold in five hundred ounce lots compared with 25,000 and 50,000 ounce lots in New York, and because it was broken up [fol. 96] smaller there was naturally a higher charge for delivery. It would also cost approximately 7/8ths of a cent per ounce to get the silver from New York to Seattle, shipping charges and insurance. Therefore, the market was approximately ½ to 3 cents higher in range.

On Cross-Examination the witness testified as follows:

Was born 1903 in England. I am not a citizen of the United States. I came to Seattle in the beginning of 1930. I have lived here continually since that time; was educated in military training at Sandhurst, equivalent to West Point. Was a graduate of Sandhurst in 1920 or 1921; entered the British and the Indian Army, where I served until 1928, I think it was. I left the British Army in Victoria, B. C.; engaged in the bond business for some length of time. I was a salesman with the Royal Financial Corporation for about a year, selling Government bonds chiefly. I finished with them somewhere in 1929. I maintained myself from a certain small income coming in from home. About the end of 1929 I came to Seattle, established a residence here April or May of 1930; in September 1930 first met Mr. Lonergan. We took an apartment in the St. Paul Apartment, which was run by Mr. Lonergan's mother-in-law. Mr. Lonergan's apartment was across the hall from ours. I got to know Mr. Lonergan quite well; felt quite friendly

toward him. We visited back and forth probably twice a month. Mrs. Lyman, my mother-in-law, was living with us at the time. Frequently Mr. and Mrs. Lonergan would call and visit with her. We did not leave various articles with them until we left the apartment the following June, I think. We were on quite friendly terms. My business [fol. 97] was the Arlington Garage from September 1930 to October 1931. I lost the garage. After I got washed out in the garage I was looking for a job until Mrs. Lonergan helped me get a job at a radio station, the following January I think it was. I continued in the employe of the broadcasting station for eighteen months. Mr. Lonergan introduced me to Mr. Walsh—that was the day I joined, or it may have been a day or two before, I came to work for Mr. Lonergan. I was not engaged in any business prior to the time I went to work for Mr. Walsh, or Martin & Company. I approached to Mr. Lonergan the fact that I was looking for a job, and so did my mother-in-law, on my behalf. An interview took place with Mr. Lonergan at the American Bank Building, at his office in 204, I think it was. He was quite enthusiastic about silver at that time and I had spoken to him in his apartment as well; He was very enthusiastic about silver—in fact almost a crusader on the subject. I was very much impressed that he was very sincere, indeed. I was injected with his enthusiasm, after I got in there. As a result of being stationed in China I acquired some information as to the importance of silver in the Oriental countries and from other experiences of mine. Before going to Sandhurst I had learned something about foreign exchange and knew something about silver. I saw the vast part that silver played in the Orient but I was not considering it so much from the point of view of silver as from the point of view of international finance. Mr. Lonergan explained to me the history of silver and I knew as an educated man that silver at one time was more valuable than gold in the Middle Ages.

[fol. 98] The value of a commodity is decided by other things, one is the supply and the other is the demand. I gained quite a little knowledge of silver and I gained most of my experience and my knowledge of silver from Mr. Lonergan. He certainly was very earnest, very sincere and very enthusiastic. There is nothing unreasonable at all in his statements concerning silver. I understood he was do-

ing something with regard to building up a silver market here and he asked me—I think he asked me to drop in and see him about it. My mother-in-law had spoken to him regarding finding me something to do—some work of some kind, and while interested, I didn't take it up at that time, but a few weeks later I came to him and we went into the discussion deeper then. He told Mr. Walsh that I was going to work for him; I did go to work for Mr. Lonergan. Yes, certainly, Lonergan had no interest in Martin and Company; I believe it was a corporation. I was on the payroll of Louis Martin Company although it was our general payroll more or less. Sometimes the checks I received were signed by Mr. Walsh but half a dozen times they were signed by Lonergan. I received, I think, it was $6.00 a week in the beginning; it was fixed by Mr. Lonergan before I actually went into and met Mr. Walsh in Mr. Lonergan's office about a day after—maybe two days before I actually went to work—about September 25. I thought it was an excellent investment. I was given the title of office manager; I did my best to put any abilities I had at their service. I had salesmen under me. I got out the market reports and one thing or another between the dates I mentioned—got them up under Mr. Lonergan's instructions. After I finished getting them up he took the job away from [fol. 99] me somewhere around the end of 1933 and I understand that Robert Lonergan got them up for a time. Some of them were gotten out before I went to work. The dates that I had connection with market letters, as having written them under Mr. Lonergan's direction, and presented them to him before they went to the mimeograph company, was about October 1 to December 31, approximately a period of three months. I wrote the greater portion of the market letters under information that had been explained to me either from newspaper clippings or from information that Mr. Lonergan had given me. I then took the market letter drawn up in its rough shape to Mr. Lonergan and we would make corrections or anything necessary to have the market letters shaped as he wished it. Besides getting up market letters I interviewed customers that came in. I would be flattering myself to say I knew more or as much as Mr. Lonergan about silver as an investment. I made the testimony to the effect that afterwards if some of the salesmen had not understood exactly what Mr. Lonergan meant

in his explanations to them, they would come to me to see if I could tell them because I had a better knowledge of silver than the salesmen, who nine cases out of ten had been connected with the firm less than three months in the beginning. I had a superior knowledge of silver and transactions—superior to the salesmen. Mr. Lonergan certainly was the whole thing. I saw nothing personally that was not entirely above board, honest and in good faith prior to July 27, 1934. I have not been taking an extraordinary interest in the case. I have had interviews with Mr. Swenson—about ten. I have talked with Mr. Hughes, the United States attorney, or anybody connected with the United [fol. 100] States attorney's office, about three times. I took all these exhibits and took them to Mr. Swenson's office before the case was started in the Courts. In addition to the exhibits I did not take a great many other papers and deliver them to the Government. This was all that I took as far as I can remember. Yes, I took a bar of silver to Mr. Swenson; I saw no rules or regulations of the exchange or the clearing house only those included in the gray book that was already introduced as an exhibit. The documents that I took to Mr. Swenson I got in the office of Louis Martin Company, 211 American Bank Building, around the beginning or the middle of September at the direction of Mr. Swenson. He asked me to bring any papers or books that I could for him. I wouldn't say I took them from the office at his direction—I would rather say I took them of my volition—in one trip. My wife was present when I took them. I don't think Mr. Walsh was present—nor Mr. Lonergan—my wife may not even have been there. I did not make a raid on room 415 Empire Building; I don't think I was ever in Room 415, Empire Building; I did not get a key for the room. I first saw Swenson about the end of August or beginning of September 1934; eleven interviews were spread over the period in between. I made an affidavit for Attorney John F. Dore somewhere around the end of August or the beginning of September. I gave the affidavit to Mr. Swenson. Yes, I know Marguerite Lonergan, the wife of the defendant.

Q. And I will ask you where the office of Pierce Lonergan & Company was in August, 1934?

A. I think it was 202 of American Bank Building.

[fol. 101] Q. After the 27th day of July, 1934, your relations with Lonergan were not so cordial?

A. No.

Q. They had been very cordial previous to that time?

A. Yes, quite.

Q. And I will ask if on or about Monday or Tuesday, the last week in August, 1934, you and your wife Dorothy, is the name?

A. Yes.

Q. Did not make a call at the office of Mr. Lonergan in Room 211, you say?

A. No, 202, I think it was.

Q. 202 Empire Building, this city?

A. No, no, American Bank Building.

Q. American Bank Building?

A. Yes.

Q. Correct?

A. Yes.

Q. And I will ask you if on that occasion you did not make a demand on Mr. Lonergan to reimburse you for the amount that your father had invested in these silver future contracts?

A. Not exactly.

Q. Well, did you or did you not?

A. Not exactly.

Q. Well, I think that question is susceptible of a yes or no answer. Will you kindly give it to me?

A. I am sorry, but there is no law which makes me answer yes or no.

[fol. 102] Q. I beg your pardon?

A. I am sorry, but there is no law which makes me answer yes or no, and I have an explanation which I would like to make.

Mr. McDonald: We will find out from the Court if I am not entitled to an answer.

The Court: He may answer the question in his own way, and then you can further inquire, that particular question.

Mr. McDonald: Exception to the Court's ruling that I am not entitled to a yes or no answer.

The Court: Exception allowed.

By Mr. McDonald:

Q. Did you understand the question?

A. I have.

Q. What is your answer?

A. Not exactly.

Q. What is your explanation of that?

A. My explanation is that I went to Mr. Lonergan regarding my mother-in-law's account.

Q. Well, then, did you make a demand on him regarding your mother-in-law's account?

A. I asked him to settle.

Q. Yes or no, please.

A. My mother-in-law's account.

Mr. Hughes: If the Court please, the witness should be allowed to make the explanation to answer his questions.

Mr. McDonald: Now, if the Court please, I asked him if [fol. 103] he made a demand on behalf of his mother-in-law.

The Court: You may proceed. There is nothing before the Court to rule upon at this time. You may proceed and ask him another.

(The last question and answer read.)

By Mr. McDonald:

Q. Did you have any conversation about your father's account?

A. Not that I remember, no.

Q. Now, I will ask you, Captain, if you did not say to Mr. Lonergan at that time that if he did not pay you the sum of three hundred dollars, that they would—no, I will withdraw that, strike that.

I will ask you if you did not say to Mr. Lonergan at that time and place: "I have two stories to tell if you don't pay me the three hundred dollars."?

A. No.

Q. I will ask you if you did not at that time and place—if Mr. Lonergan did not say he only knew one story?

A. No.

Q. I will ask you further if you didn't then say that there were two stories, and you would tell the stories that would get you the money?

A. No.

Q. Now, Mr. Coventry, do you know Mr. Luckerath?

A. I do.

Q. I will ask you if you know where his office was on or about the 30th day of August, 1934?

A. Yes, I know where his office was.

(Recess.)

[fol. 104] (Jury present.)

By Mr. McDonald:

Q. I will ask you, Captain, if on or about the 30th day of August, 1934, you and your wife made a call at his office?

A. We did.

Q. And at his office you found Mr. Luckerath?

A. I did.

Q. And you there discussed with him the fact of your father having invested in silver futures contracts?

A. Yes.

Q. I will ask you if it is not a fact that you made this statement at that time and place to Mr. Luckerath. "Tell Mr. Lonergan that this is the last chance that he will have to fix up my father's account, and you had better get with Lonergan in the next twenty-four hours and get him to fix it up, or otherwise I have two stories to tell, and we will tell one that is unfavorable to him with the authorities, unless he pays this money?"

A. No.

Q. You have already said that you know the defendant's wife, Marguerite Lonergan?

A. Yes.

Q. And I will ask you if on the 31st day of August, 1934, you did not meet Marguerite Lonergan, the wife of the defendant, in the office of John F. Dore, attorney, in the Smith Tower Building?

A. I met her in the office of John F. Dore about that date, the exact date I do not remember.

[fol. 105] Q. And I will ask you if at that time and place you did not make this statement to Mrs. Lonergan, that she had better get ahold of her husband, and that if you received five hundred dollars, that you would tell a story favorable to the defendant Lonergan to the authorities?

A. No, I did not.

Q. Just wait till I finish.

A. I am sorry, I thought you did.

Q. And if I do not, I will testify against him, and I will make it plenty hot for him.

A. No, I am sorry.

Q. Or words to that effect?

A. No words to that effect.

Witness (continuing): To the best of my knowledge the Seattle Metal Exchange was controlled exclusively by four men, Pierce Lonergan, J. R. Walsh, Louis Gill and George Goggin. I know something about the operations of the London silver exchange. I was last in London about 1920 or 1921; there is no such thing as a silver exchange; there is a market. I don't know if there is ever a call for it—it is simply run by four brokers. During the course of my activities with Louis Martin Company I induced people to invest; I made addresses to the people on the subject of silver—the desirability of it; I prepared the addresses my self. I spoke once on the radio—either KOMO or KJR, I believe. The meetings addressed by Mr. Lonergan were pep meetings for salesmen. I was present practically on [fol. 106] every occasion. That averaged about once a week from October through about the end of April. From the beginning of December until the end of March they were regular about once a week and other times they were rather irregular. Mr. Coles is a very good pep talker. He and Mr. Lonergan had plenty of enthusiasm. I had quite a lot of enthusiasm; I made talks during the meeting and I believed in silver as an investment. There is no salesman of A. P. Jordan & Company to the best of my knowledge. Of all four of these firms only two had representatives. I have seen the book, defendant's Exhibit A-1, in the offices of brokers of the Seattle Metal Exchange. I don't think Jordan & Company had any because Jordan & Company was more or less without an office; there were three or four in Gill & Company—probably a dozen around altogether. This was kind of a bible around the office for some things. I have read it through pretty thoroughly.

By Mr. McDonald (showing map in Defendant's Exhibit A-1 to witness):

Q. You are quite familiar with that map?

A. You want me to explain this map, is that it?

Q. You are familiar with it?

A. Yes.

Q. Okeah. Go ahead.

A. This map is entitled "Silver Market". It shows where silver is produced. The black square marks here, you see, are the mining areas of silver. The circles, or shaded areas are where silver is said to be consumed, that is, used. The

[fol. 107] black lines here which carry white arrows in them show the flow of silver from the different world markets and production centers to the consumption centers.

Q. That is all. Calling your attention to Page 16 of this "United States Department of Commerce Bulletin The Silver Market", I will ask you if it is not a fact that at one of these meetings, not only once, but several times, Mr. Lonergan didn't lecture on the London operations on the London Market?

A. If you limit it to once, Mr. McDonald, I will answer yes, but several times, I will have to answer no.

Q. All right, limit it to once. On that occasion I will ask you if he did not produce a copy of this pamphlet which you have identified as being in the office, and read this that I am going to read to you now on Page 16 entitled "How the London Market Operates"?

"The London market being participated in by persons the world over, it might be supposed that such a wide market would be complex in its operation; yet the actual workings are relatively simple. Normally most of London's silver-bullion business is transacted in a 15 or 30 minute meeting, once each business day, of representatives of the following four established firms of bullion brokers:

"Mocatta & Goldsmid, 7 Throgmorton Avenue, London, E. C. 2.

Originally established in 1684 as Moses Mocatta.

"Samuel Montagu & Co., 114 Old Broad Street, London, E. C. 2.

Established in 1853.

"Pixley & Abell, Palmerston House, London, E. C. 2. Present Company registered in 1874; firm originally estab-[fol. 108] lished in 1869 as Pixley, Abell, Langley & Blake.

"Sharps & Wilkins, 19 Great Winchester Street, London, E. C. 2. The present company, registered in 1844, was, in fact, established in 1825, as James and Granville Sharp; from old records of the firm the business can be traced back to 1740.

"At 1:45 p. m. on week days and 11:30 a. m. on Saturdays the representatives of these bullion brokers meet at the office of one of them (at present, that of Sharps & Wilkins, it having the best accommodations). Each of these brokerage firms receives orders from banks and others in England and from buyers or sellers in all parts of the world, the four

firms together receiving all the silver-bullion orders coming to London. Such orders may refer to silver for immediate delivery, or for delivery at some future date. For any given delivery—say, spot silver—the brokers at their meeting compare their buying and selling orders (which may mention a specified price or simply 'at market') and fix the price at such a level as will effect the greatest number of transactions. It is presumably to the brokers' interest to do this, because their profit depends upon the volume of business they transact. Precise information on the actual conduct of business at the brokers' meetings is not made generally available. What supposedly takes place is that all orders for sale or purchase of silver bullion for spot delivery at the market are compared, then the orders for spot silver with the price specified by the brokers' client. The price which will enable the greatest volume of business to be done is usually the price fixed. On a given day it may be possible for the four firms to execute most of the day's business [fol. 109] each on its own books. Again, a single broker may have a considerable excess of buying over selling orders, and find it necessary to match such excess with the other brokerage firms' selling orders. The price of silver for future delivery would depend upon the spot price, the prevailing rate of interest, and other considerations.

"While the transactions on the London silver market all call for delivery of actual bullion in London, the exchange market is really part of the silver market. In practice there is a large proportion of wash transactions which simply balance each other, immediately or later, and in the end involve no physical movement of the metal. In fact, the larger part of the London market's transactions are undoubtedly liquidated individually by the four brokerage firms on their own ledgers, at the price fixed at their meeting, without the necessity of interbroker transactions.

"An example may help to make this type of operation clear. Thus, an eastern bank in London may appear as a participant in a given day's silver market in any of several ways, the following being a hypothetical example: The bank, whose business may be simply described as setting off purchases and sales of foreign exchange in such ways as to make a profit for its shareholders, on a certain day is called upon to sell for sterling 200,000 Shanghai taels for future delivery. By purchasing an equivalent amount of

silver in London and shipping the metal to Shanghai the bank is enabled to meet its future commitment in Shanghai. Naturally, the bank does not receive payment for the 200,000 Shanghai taels until delivery thereof is made. But it must pay cash for the silver it buys in London, thus tying [fol. 110] up a sum of money for a period of several weeks while the bullion is being shipped to China. Therefore, the price paid for the bullion must be lower than the price received for the Shanghai exchange by an amount sufficient to pay shipping expenses, interest, and a profit."

Witness (continuing): To the best of my knowledge, Mr. Lonergan never read that as a whole at any meetings, parts of it he may have read; he may have read a part or two out of that; he told us things he never lectured on the New York silver market; he has told us things about the New York silver.

Q. And on his talks on the New York silver market, I will ask you if he didn't read to you as follows, quoting from Page 19 of the book.

"The principal features of the New York silver market are (1) spot silver, the informal telephone market made up of banks, bullion brokers, bullion dealers, smelting and refining companies, and the like, (2) the official price, and, since June 15, 1931, (3) futures, the recently inaugurated trading in silver futures on the National Metal Exchange of New York.

"Spot Silver. According to long-standing practice, business in silver has for many years been done over the telephone, either by direct negotiation between seller and buyer or through the intervention of a broker. In New York the principal buyers of silver are banks with branches or correspondents in the Far East or in London. These banks represent the Chinese and Indian demand. The principal [fol. 111] sellers are the large smelting, and refining companies, which either mine silver themselves or buy it, in the form of ore and unrefined bullion, from mining companies. Sometimes they do both. The large metal companies do not sell silver in lots of less than 50,000 fine ounces (0.999 fine, or better). As there are few manufacturing companies requiring silver in such large quantities, purchases by the trade are usually made from bullion dealers, of whom there are two in or near New York. By the trade

is meant the American and Canadian manufactures of sterling and plated silverware, principally, and the industrial (chemical) demand. The photographic industry is a large consumer, and the largest manufacturers of film photographic paper are in a position to buy directly from the leading metal companies.

"The brokers have always done their principal business with the banks and have direct telephone connections with their principal local clients. Since June 15, 1931, they have had access also to the facilities of the National Metal Exchange, where futures trading in New York is centered, and generally have one or two floor members at the exchange throughout trading hours.

"Since the New York market in spot silver is carried on very informally, there is naturally no record of the total business done, nor the prices obtained by traders during any given period. Hence, an informal method of recording the trend of the market came to be evolved—the 'official' price of silver."

Witness (continuing): At these meetings we discussed the [fol. 112] chart on Page 3. The chart shows the wholesale silver prices and the wholesale commodity prices as made up for comparison to show how the price of silver in the year 1914 and the year 1931 more or less keeps on a parallel with the wholesale commodity prices. Mr. Lonergan directed the whole book to my attention; he did not direct the attention of the group to that portion read by you beginning on page 13, entitled, "A day with Silver Around the World." He was absolutely right that this was from the standpoint of place and time an excellent place for a silver market.

Mr. Lonergan made the remark that the margin the customer was to put up was fixed by the broker for each customer, depending upon the financial standing of the customer, but it was not a habitual remark of his. The customers dis not contract on the exchange themselves—they had to deal through a broker or an associate; then the member brokers went on to that exchange and contracted among themselves. The theory was that they put up margins on behalf of themselves. The brokers had to ask margin from the customer, which was put up with the clearing house. The purpose of the margin was to guarantee the performance of the contract. Lonergan told me and the

others at these group meetings that the operations of the exchange and the clearing house was a complex and difficult thing to understand. I do not recall that he made any statement that to really get a comprehension of how these silver future markets operate it would really necessitate an attendance at the University, department or course in Business Administration. The exchange and the clearing house composed of these four member brokers was operated as distinct from the brokerage houses. An exchange is merely a group of brokers—where a group of brokers meet—the place of trading. The exact date that the market closed, [fol. 113] I have no knowledge. The President nationalized silver on August 9 but there was no trading going on for many days—several days before that time, but it was more than three days that the market was open after we made demand that it be closed. Mr. Enquist put up money with the bank and was sold out. I do not remember the names of any others. I did not use the list, defendant's Exhibit No. 6, I was not a salesman—I was just an inside man, it didn't create any suspicion in my mind until July 27, 1934; it was perfectly innocent as far as I was concerned. I saw nothing until July 27, 1934 that would cause me to think there was anything wrong. At the meetings Lonergan told the people in his opinion the price of silver was going up; he usually mentioned in his opinion, as well; and Mr. Lonergan was right in his guess that silver was going up—it did go up.

At least twenty or thirty times between September 25, 1933 and June 15, 1934, Lonergan made representations that the money was going to be put up in a trust fund somewhere—six times at brokers' meetings, once or twice privately and the rest before customers—Mr. Bennett was one—and Mr. Atwood—I don't remember the date. I can't say approximately the date; Mr. Bennett as a customer was always in and out of the office. He was asking Mr. Lonergan about it and Mr. Lonergan explained things. There were quite a number more—I cannot recall them all.

When you talk about margins—there is such a thing as an original margin; the word "margin" is ambiguous. You [fol. 114] put up an original margin and then there is also a minimum margin; the minimum margin was required the same of the customer as of the broker. I know nothing what the printed rules of the exchange provided except that

which was in the gray book. I only know from what Mr. Lonergan told me and from what appears in the gray book.

To the best of my knowledge, the volume of sales in that market were never disclosed to the public. To the best of my knowledge, there were no buyers after July 27th in that market. I do not remember Mr. Lonergan stating in the meeting, or in the presence of the investors, "Buy silver, but don't gamble or speculate in it." I do remember him saying buy silver. I remember him warning one man, Mr. Bennett, if he didn't have the money not to gamble in it.

(Plaintiff's Exhibit No. 13 received in evidence.)

Defendant's Exhibit A-2 was the type of card signed by investors on originally making a margin deposit. This card is the one which I signed on behalf of my father. The signature, W. C. Coventry, is my signature. These files and records were kept in the other office. Mr. Walsh, who was president of Louis Martin Company, did most of his work off the floor of the exchange, that is, in his office off the floor of the exchange part of the Louis Martin business was done in that office of Mr. Walsh.

(Plaintiff's Exhibit No. 14 received in evidence.)

Mr. McDonald: At this time, if the Court please, may I have the privilege of reading the card to the jury? This is a card that Captain Coventry signed. The card on one side reads, (Mr. McDonald reads from card). The reverse side. "The undersigned, the customer, agrees with Louis Martin Company, the broker:

[fol. 115] 1. That all transactions for or in connection with the account of the customer shall in all respects be subject to the rules and customs of business of the Seattle Metal Exchange and its clearing house or any other Exchange or Board of Trade and of its clearing house on which such transactions may be executed.

2. That all orders for the purchase and sale of any security or commodity are received and executed with the distinct understanding that actual delivery is contemplated.

3. That the broker agrees to use due diligence in forwarding the customer's orders to their destination, (balance of paragraph omitted)

4. The customer agrees to pay the customary brokerage and commission charges, and interest at current customary rates, (balance of paragraph omitted)

5. That all transactions for or in connection with the account of the customer shall be deemed to be included in a single account notwithstanding the fact that such transactions may be segregated into separate accounts on books of the broker. The customer further agrees that all securities held by the broker shall be for the protection of all the customer's indebtedness.

6. That whenever the broker deems it necessary for the protection of the broker, the broker may sell all or any securities or any property which may be in the possession of the broker, or which the broker may hold or be carrying for the customer, either individually or jointly with others, and may apply the proceeds on any liability or liabilities of the customer to the broker, and if there is any deficiency the customer will pay the same on demand, and the broker may likewise buy any and all securities of which the account of the customer may be short, and may at any time close out the account of the customer in whole or in part. The broker may make any such sale or purchase or close said account in whole or in part, according to the judgment of the broker and in such manner as the broker may determine, either [fol. 116] on the exchange or other market where such business is usually transacted, or at public auction or at private sale, without notice to the customer and without a prior tender, demand or call of any kind upon the customer. Should the broker, however, make any tender, demand or call of any kind, or give notive of the time or place of any sale or purchase, the action of the broker in that behalf shall not waive nor impair any right of the broker to buy or sell at any time, as herein provided, nor any other right given the broker hereunder.

7. That all securities and collateral deposited for the protection of the customer's marginal account may be shipped to Seattle, or any other place, and may be held and used there by the broker until the customer shall become entitled to redelivery thereof. The broker shall have a reasonable time after demand for redelivery to ship securities or collateral from Seattle or from any other place where they may be, to

the place where the same are to be redelivered to the customer, and shall only be required to redeliver securities of the same kind and character as originally deposited.

8. That if and when there is any indebtedness owing in my account, I hereby consent that all securities purchased by the broker for my account and risk and any securities which are now or may hereafter be deposited by me with them to secure any advances made by them for my account may be loaned by the broker or may be pledged by them either separately or together with other securities, either for the sum due thereon to said broker, or any greater sum, all without further notice to me.

9. That all statements of account which the broker renders the customer from time to time shall be deemed corre-t, (Balance of paragraph omitted).

10. That I hereby represent that I am of full age and sound mind (balance of paragraph omitted).

11. That it is understood and agreed that no employee of the broker has any right or power, express or implied, to [fol. 117] modify, change or abrogate, either orally or in writing, any of the terms and conditions of this agreement. This agreement shall not be revoked by the customer except by a writing delivered to the broker. Such revocation, however, shall not affect any transaction theretofore entered into between us.

12. That any waiver by the broker of any provisions hereof in any instance shall not be deemed a waiver of any rights given the broker hereunder.

13. Wherever the word securities is used herein it shall be deemed to mean and include commodities and/or contracts for commodities.

Dated July 27th, 1934.
Witness: W. J. L.
W. G. Coventry."

Witness (continuing): I can only identify defendant's Exhibit A-4 as a form which is not limited to any one of the companies, although this form has its heading Louis Martin Company, it would be very hard to identify this confirmation out of several hundred confirmation orders.

Testimony of Mrs. Mae Engle, Called as a Witness on Behalf of the United States

Mrs. Mae Engle, the witness called in behalf of the United States, being first duly sworn, testified as follows:

My name is Mae Engle. I reside in Los Angeles at present. In the fall of 1933 I lived at 201 Olympic Place, Seattle, Washington. At that time I owned and managed an apartment house in Seattle. At present I am living with my daughter. I knew nothing about silver except what Mr. Coles and Mr. Lonergan told me. (Witness identifies Mr. Lonergan.) I saw Mr. Lonergan during the month of September 1933. Mr. Coles took me to his office. Mr. Coles had explained to me about silver. When I went to Mr. Lonergan's office he explained to me how safe an investment it was, and that my money was safer in silver than in the bank. [fol. 118] He explained to me how well the Seattle market was protected by the New York office, or Metal Exchange, in Shanghai. He told me that in the event the market breaks here, that the New York office or Shanghai would step in and protect him, and protect us, and that there was no chance whatever of a loss to me. I didn't quite understand his references to margin being paid in my investors. I saw Mr. Lonergan three times prior to the 23rd day of September, 1933. He said if I did want to put my money in, he would put in the same amount, and I disremember, but I'm pretty sure he would put up a thousand dollars, and I would put in a thousand dollars, and he would guarantee me three per cent a month on my thousand dollars. I did not put in the thousand dollars at that time. I went to see Mr. Walsh, and Mr. Walsh and I had a long conversation about silver's future and its value, and what a wonderful thing it would be, and he advised me not to go in that way—there was a check for $1,000.00 or $1,500.00, whichever it was with Mr. Lonergan's name on it. Mr. Walsh said that I wouldn't if I were you. I'd put my own money in and make all there was to be made. On the 23rd of September, 1933, I gave Mr. Coles a check for $500.00 in my home. I was supposed to purchase 5,000 ounces of silver. During the conversations I had with Mr. Lonergan and Mr. Coles prior to September 23, 1933, it was explained to me they had a clearing house fund where the money was put, and it was handled in a way that was protected so well in this clearing fund that anything wouldn't go wrong. This letter, plaintiff's exhibit No. 14, was

brought to my home by Mr. Coles about the first part of October. About November 8th, I gave to Mr. Coles $1,100.00. I left it all up to Mr. Coles, Mr. Lonergan and Mr. Walsh. Shortly after November 11th, I had occasion to see Mr. Walsh. He said I was quite fortunate in getting in. On November 14, 1933, I gave Mr. Coles a check for $600.00. Plaintiff's exhibit No. 16 is the receipt I received from Mr. [fol. 119] Coles and Louis Martin Company. I received this from Mr. Coles in the office of Louis Martin Company. I left the matter entirely to my salesmen and Mr. Lonergan and Mr. Walsh.

(Plaintiff's Exhibit No. 15 received in evidence.)

About December 14, 1933, I gave Mr. Coles $100.00. This receipt is Plaintiff's Exhibit No. 17, which I received from Norman E. Coles.

(Plaintiff's Exhibit No. 16 received in evidence.)
(Plaintiff's Exhibit No. 17 received in evidence.)

Objections on ground no foundation connecting defendant, hearsay; overruled, exception noted and allowed.

The following year of March 1934, Mr. Coles called at my home, and asked if I had any more money to invest, and I gave him another $120.00 $60.00 from my daughter and $60.00 from my son. Plaintiff's Exhibit No. 18 is the receipt which Mr. Coles sent to my son.

These are confirmations (Plaintiff's Exhibit 19). They were mailed to me; I received them along about November 8, 1933 on up to June 6, 1934. During March 1934, I received from Louis Martin Company either $100 or $160.00. From March on through the spring of 1934 I made many attempts to contact Mr. Lonergan, but he wouldn't see me. I was able to see Mr. Walsh.

(Plaintiff's Exhibit No. 19 received in evidence.)

On the morning of July 30, 1934, I received a letter through the mail (Plaintiff's Exhibit No. 21). After I received this letter I did not see Mr. Lonergan. Mr. Lonergan refused to see me. I never did see Mr. Lonergan after that.

(Plaintiff's Exhibit No. 20 received in evidence.)

Objection on ground no foundation connecting defendant, hearsay; overruled, exception noted and allowed.

(Plaintiff's Exhibit No. 21 received in evidence.)

Objection on ground no foundation connecting defendant, hearsay; overruled, exception noted and allowed.

[fol. 120] Cross-examination:

I have lived in Seattle seven or eight years, went away for a year and I came back. Last time I came back in 1930, and I lived here up until last December, and am now living in Los Angeles. I first met Mr. Lonergan when Mr. Coles took me to his office in September, 1933. I first met Mr. Norman Coles more than four years ago. I first met him when he came to my house in an effort to have me sell some pass books of a savings and loan company that had failed. I didn't have any transaction with him at that time. Later I had a South American Bond that had lost its value. He handled that for me. I did not know what his business was, but he was dealing in the stock market himself. I do not know that he had an office. The South American Bond deal was the only one I had with him. He came in and out of our house a good deal because I had a daughter who was ill, and he became very nice and visited her quite a bit, and recommended different things. His calls were for business, and he was interested in my daughter being ill and he had a daughter who was ill. I do not recall that he ever suggested that I invest in other things. As a result of his calls at my home I had a great deal of confidence in him, he impressed me as a very fine gentleman. He came to me and talked to me about silver about a week or two before I met Mr. Lonergan. Mr. Coles had explained the silver question two or three times to me before we went down to the American Bank Building to see Mr. Lonergan. While we were there Mr. Coles asked Mr. Lonergan some questions. Mr. Coles asked Mr. Lonergan if he thought silver was a very good thing to buy. Mr. Lonergan said that if I had the money to buy the silver, there was nothing that I could invest in better. The Defendant's Exhibit A-4 is similar to the others produced here. I received the confirmations at the time I entered into the trans-[fol. 121] actions with Mr. Coles. Sometimes I read them and sometimes I laid them on the desk. I didn't know what it was all about. I do not remember reading on this Exhibit that all transactions were subject to the rules and customs of the Seattle Metal Exchange and its clearing house. I had plenty of opportunity to read it. I did not understand that if I invested, they would have the right at any time to call for margins.

My first interview with Mr. Lonergan was in September, 1933, and at that time they were to guarantee me 50% or better. About the third visit I made to the office, they offered me 3% per month. That was shortly before the date of my first purchases on September 23rd. I did not accept this 3% guarantee. The second interview was about a week after the first, and the third interview was a day or so after the second. They all came close together. I had no more interviews with Mr. Lonergan after the third interview. In each case Mr. Coles came and got me and took me down. After Mr. Lonergan told me that silver was a good thing to invest in, I spoke to Mr. Coles and Mr. Walsh and a man in the bank where I banked. I explained to him what I had been told.

Along in the spring of 1934, I knew that Mr. Coles had his own office, but he was still a member. There was a letter telling me when he made the change. When I wanted to transact any business, Mr. Coles seemed to be the only one I could get. He was my friend and broker. I always saw Mr. Coles because I could not get in touch with Mr. Lonergan. He never did answer me. I do not know as I had any business with Mr. Coles other than the silver business and the South American bond. I don't recall any other.

Testimony of JOHN H. ROCHE, Called as a Witness on Behalf of the United States

[fol. 122] MR. JOHN H. ROCHE, called as a witness on behalf of the Plaintiff, having been first duly sworn, testifies as follows:

My name is John H. Roche. I am a Special Agent, Federal Bureau of Investigation, United States Department of Justice. My position in the Department is that of an auditor. Plaintiff's Exhibit No. 22-A is Gill & Company option ledger and 22-B is Gill & Company ledger. Plaintiff's Exhibit 23-A is General Ledger of Lonergan & Company, Plaintiff's Exhibit 23-B is the option ledger, the cash journal and purchase and sales journal of Pierce Lonergan & Company. Plaintiff's Exhibit 24-A is the general ledger of Louis Martin & Company. Plaintiff's Exhibit 24-B is the option ledger of Louis Martin & Company. Plaintiff's Exhibit 26-A is the general ledger of the Seattle Metal Ex-

change. Government's Exhibit 26-B is the operating cash journal of the Seattle Metal Exchange. Government's Exhibit 27 are the trade sheets of the Seattle Metal Exchange clearing association.

(Witness excused.)

(Books received in evidence as Plaintiff's Exhibit Nos. 22-A, 22-B, 23-A, 23-B, 24-A, 24-B, 24-C, 25, 26-A, 26-B, 27.)

"Mr. McDonald: If Your Honor please, for the purpose of facilitating the trial, we have entered into this stipulation, reserving the right in the stipulation to challenge the materiality and relevancy of the books.

The Court: Yes.

Mr. McDonald: And just to preserve our record, we want the record to show that on those grounds we do object.

The Court: And that objection is overruled.

Mr. McDonald: Exception.

The Court: Exception allowed."

[fol. 123] Plaintiff's Exhibit No. 7 is a letter that I saw in the office of Louis Martin Co., on December 16th, 1933, which letter was mailed to Mr. Frank Givens at Port Orchard, Washington, either by me directly or by one of the stenographers under my direction. That is my signature and I compiled that Exhibit (7) under the direction of Mr. Lonergan.

[fol. 124] Testimony of NORMAN E. COLES, Called as a Witness on Behalf of the United States

NORMAN E. COLES, the witness called in behalf of the United States, being first duly sworn, testified as follows:

My name is Norman E. Coles, and I reside at 1101-36th Avenue North, Seattle, Washington. At present I am selling life insurance for a Legal Reserve Life Insurance Company. Dating back to the early spring of 1932, I had several conversations with Mr. Lonergan regarding the silver market. He had been making talks on silver in various parts of the State before Kiwanis Clubs. I attended two of those lectures, one before the Commercial Club in Tacoma, and one before the Rotary Club at Port Orchard. Mr. Lonergan had been studying the silver situation, the world silver

situation, and was attempting to, I would say educate me. He thought there was a big future in it, and I thought I could go out and sell silver bullion. There was no talk at that time about a silver futures. His thought was, and he was trying to impress upon me, was to accumulate silver in the City of Seattle, silver bullion. As a result of these conversations I went out and attempted to sell Mrs. Blanche I. Baker silver bullion. She didn't buy it from me, but sometime a little later on, she did buy it from Mr. Lonergan. I forgot the matter for quite awhile. It was in the early summer of 1933 when Mr. Lonergan again contacted me. We would talk silver every month or so. I went to his home where we discussed silver. He gave me a good deal of information on silver bullion. Then in the summer of 1933, he told me that a market had been established, the Seattle Metal Exchange. The market had offices and were prepared to trade in silver futures contracts. Probably two months after that before I talked to Mr. Lonergan again, and the result of that talk was that I [fol. 125] made a contract with Louis Martin & Company to sell the silver futures. This contract set forth the amount of brokerage I was to receive. The contract was given to me by Louis Martin & Company, John R. Walsh acting for the company. I think Mr. Lonergan was present when the contracts were settled on. Mr. John R. Walsh handled the employment contract on behalf of Louis Martin & Company. My employment started approximately the latter part of August or the early part of September, 1933. Mr. Lonergan told me that the Seattle Metal Exchange was a market similar in structure to any commodity market, where customers could trade, could buy and sell contracts for future delivery of silver. He told me that there were four members of the exchange, Pierce Lonergan, John R. Walsh, George Goggin and Louis Gill. I was never on the floor of the exchange. I became an associate broker for Louis Martin & Company about April, 1934. I operated under the name of Norman Edward Company, from January, 1934.

Mr. Lonergan explained the futures contract, and I understand it was a matter of buying silver for delivery at some future date, putting up so much as a guarantee in money. When delivery date came they could either take delivery of that silver or could sell the contract. The delivery

dates, or delivery months, were about every 90 days. Contracts were in multiples of 500 oz-. I received a commission of $2.00 on each contract from Louis Martin and Company. Mr. Lonergan told me that 50¢ was the commission paid by the customers which went to the exchange. There were frequent meetings held in the offices of Louis Martin & Company at which salesmen were present. All salesmen who were attempting to sell silver were in attendance. Mr. Lonergan was frequently in attendance. The talks were largely to do with a general summary and outline of the [fol. 126] silver situation, nationally as well as internationally. Mr. Lonergan made frequent lectures and talks. Present at those meetings would be Mr. Coventry, Mr. Gill, Mr. Walsh, Mr. Hughbanks, and others. There were probably around six or seven, but when we got down to the late spring of 1934, there would be quite a large number of those salesmen at meetings. It would take an awful long time to cover all that Mr. Lonergan said at those meetings, because he covered everything from A to Izzard, the whole world picture of silver. We were told by Mr. Lonergan that it would be impossible for this market to be raided, because silver being a world thing, it would be sustained by other markets. The market operated just like any commodity exchange, and when the buyer put up his margin, or his guarantee, that he would take delivery, and on the other side of that transaction was the seller, who likewise put up his guarantee that delivery would be made. So both the buyer and the seller had their guarantees in the so-called clearing house, and when it came to delivery day there was sufficient guarantee on the seller's part to deliver the silver, and there was sufficient gaurantee on the buyer's part, that if he didn't take delivery, it would be sold. Then the seller got his profit. It operated just like any commodity exchange. The market is a place where the buyer and the seller meet. That is what this was. The buyer and the seller met. Transactions were made. The margins were kept in the Clearing House. The clearing house was a place where these funds were maintained, so that when delivery dates came, the money was there to make delivery, or to conclude the transaction, either to sell it or take delivery. I do not know who controlled this fund. We understood that deliveries were to be made on delivery months. Margins, when I started, were 10¢, later they were in-

creased to 12¢. It was changed again in June, after the [fol. 127] Government legislation came out with reference to silver. It was lowered to 6¢, I believe. I never sold any at that rate. If investors deposited more than the minimum margin requirement, they just had greater credit on the books. They would purchase the same amount of silver. If the market went down, nothing would happen until the credit above the minimum margin was exhausted, then if they failed to deposit more margin, then a portion of the account would have to be sold to maintain that certain margin balance. The customer guaranteed the margin.

I made an appointment for Mae Engle to meet Mr. Lonergan in his office. We had quite a conference. Mr. Lonergan attempted to explain to her that there was an opportunity at the present time to make money in silver contracts. She explained to him that she couldn't afford to lose any money, as she didn't have any to lose. Mr. Lonergan told her that the safest thing in the world at the present time, or at that time, was investment in silver. He told her to buy silver. He explained that the Seattle Metal Exchange in its connection with world markets, as I did myself previously, the other world markets would step in in case there was a break in this market. That it was silver, and it couldn't possibly be raided. I can't recall that at our first meeting Mr. Lonergan said anything about the clearing house fund, but at subsequent meetings I think he tried to explain to her what a market was, the modus operandi of a market. It was quite involved—the whole explanation that he gave. He told her that the margin went into a clearing house, that the margin had to be maintained that went into the clearing house. He stated that on delivery dates, if she wanted to take her silver, pay up her balance, she could get her silver in the delivery month. Government's Exhibit No. 13, a letter of guarantee had nothing to do, as I recall, with that first purchase by Mrs. Engle. [fol. 128] It had to do with what was to follow this date. This guarantee was never accepted or acted upon by Mrs. Engle. Between September 23, 1933 and March 12, 1934, Mrs. Engle made other investments through me in silver future contracts. The salesmen under my supervision contacted one, George Alvin Cooper. Mr. Cooper was brought into the office by Mrs. Spear, a relative. They purchased silver through the Louis Martin Company. My salesmen

went out and interested Mrs. Mary Shattuck in the purchase of silver contracts. Personally I went out myself and talked to her. The representations and statements I made to investors was under the authority of Mr. Lonergan. He said it was a safe and profitable investment. Mr. Lonergan stated that the Seattle Metal Exchange could never get out of line with the world market because it never had in 5,000 years, and never could, because the other world markets would step in and buy anything in that market under the world price. We were told there was a clearing house fund in which the margins, both the sellers' and buyers' were kept.

On Friday, July 27, 1934, the market went down three cents. About twenty minutes to eleven, in the forenoon, Mr. Lonergan called me and asked me to come to his office. I asked him the reason for the market going down that morning. It was then down about three cents, the limit it could go down. He first asked me if I could go out and get enough money together to pay for 200,000 ounces of silver. I said I didn't know, that it shouldn't be too difficult. He said there is 200,000 ounces of silver being sold by California interests, and it will have to be absorbed. We close tomorrow, and won't be open till Monday. He said to get enough money to absorb that 200,000 ounces of silver. I then called together two or three of my own men and said [fol. 129] for heavens sake see if you can't get some of your friends, and see if you can't get this silver absorbed. On the morning of July 28, 1934, I started out by running around trying to get this silver taken up. We contacted three or four people after much running around in the forenoon, and we didn't get very far with it. About 11:00 o'clock in the morning we called a meeting together of the associate brokers and salesmen in the American Bank Building, in the office of Louis Martin Company, and did much talking of what we were going to do all week. At this meeting was Coventry and myself, and about four salesmen, Mr. McKnight, Mr. Hughbanks, Mr. Cartwright, Mr. Sternoff and a Mr. Billberg from Spokane. Lonergan was not present. We wanted to have a full membership together so we put in a long distance call and got Mr. Arthur Pritchard and Ray Thompson to come over. Ray Thompson was there and Mr. Pritchard. At about five o'clock in the afternoon we started to draw up a resolution, to have the market

recessed for a period of three days. Government's Exhibit No. 9, is a copy of the resolution. Mr. Billberg and myself took the resolution to Mr. Lonergan. When we presented it to him, he said that the market couldn't be recessed, because the minute the market recessed, all the brokers would go into receivership and be insolvent. The market had to be kept open, because these customers should be given the privilege to sell that silver, if they had silver to sell on the market. He said that I should know that much myself. That the brokers would be all wiped out right then, if they closed the market down. Therefore the market couldn't be recessed. We stayed around the rest of the evening. I didn't leave until about one or two in the morning. We were still trying to find ways and means to recess it ourselves. We were going to try to get assistance [fol. 130] from outside; some place, to force the market to recess. On Monday, July 30th, the market opened at the regular time and closed at the regular time, and went down three cents. It was the limit for the day's trading. The following day, the market went down another three cents. That nine cents drop wiped out practically all of my account.

Plaintiff's Exhibit No. 28, is a notice to Mrs. Engel, calling for more margin. It bears my signature. I don't know who wrote them or who dictated them. I was told by Mr. Lonergan to send out such notices to my customers. They were compiled under Mr. Lonergan's direction.

(Two letters received in evidence as Plaintiff's Exhibit No. 28.)

Objected to, no foundation connecting defendant, overruled, exception noted, and allowed.

Miss Mary Frances Engle is the daughter of Mrs. Mae Engle, one of my investors. This letter being Exhibit No. 29, letter calling for more margins on my firm. It was executed by Louis Martin & Company. I can't swear that I received it by mail. It is addressed to Norman Edward Company, and that is my company, and signed by John R. Walsh.

(Letter received in evidence as Plaintiff's Exhibit No. 29.)

Objected to, no foundation connecting defendant, overruled, exception noted, and allowed.

The letter, being Exhibit No. 30, is a letter to Mr. Romer, asking for additional margins. It bears my signature. It was dictated by Mr. Lonergan in the American Bank Building. It was sent by mail. The attached portion is copy of a letter which I received from Louis Martin Company on August 23rd, asking for additional margins. It was incorporated to show that the call had been made upon us. They were mailed from Seattle in the State of Washington. I mailed them personally.

(Letter received in evidence as Plaintiff's Exhibit No. 30.)

[fol. 131] The letter, being Plaintiff's Exhibit No. 31, is one handed to me by Mr. Lonergan. It is addressed to Norman Edwards Company. I do not known whether or not this is Walsh's signature.

(Letter received in evidence as Plaintiff's Exhibit No. 31.)

Plaintiff's Exhibit No. 32, is a notice calling for more margin upon Frank Anderson, a customer. It bears my signature. It was compiled by whom I don't know, nor do I know who dictated it. I think they were prepared under the direction of Mr. Lonergan. They were all made out at the same place, as was the letter in the American Bank Building. Mr. Frank Anderson was a customer of one of my salesman.

Q. I will ask you to state how that was sent or transmitted, if you know?

A. All these notices that are similar were sent through the mail.

Q. Sent by whom?

A. At the place where they are dropped in the mail box, I don't know where they were dropped in the mail box.

Q. Do you know who dropped them in the mail box?

A. I am under the impression the girl who was working in my office did the actual mailing.

Q. The actual mailing was under whose instructions?

A. Mr. Lonergan's.

Q. Do you recognize the second portion of that exhibit?

A. Yes.

Q. Where have you seen that before?

A. They were all made out in the same place with the letter, in the American Bank Building.

The Court: The reporter needs to get what you say, and the jury have to get what you say, and all counsel.

[fol. 132] Q. Just repeat your answer.

A. They were made out in the same place the letters were, in the American Bank Building.

Q. Mr. Coles, are you acquainted with Frank Anderson, or were you acquainted with him?

A. Slightly.

Q. Was he one of your customers or investors?

A. He was a customer of one of my salesmen.

Q. I will ask you where he is at the present time, if you know?

A. He is dead.

Mr. Hughes: If the Court please, on that I am going to offer what has been marked here for identification as Plaintiff's Exhibit No. 32, together with the attached envelope, and further state that Indictment Count No. 4 is predicated or based upon this exhibit.

Mr. Luckerath: I object on behalf of the defense, if your Honor please, not adequately identified as having been introduced into the mails.

The Court: The objection is overruled. Plaintiff's Exhibit No. 32 is now admitted in evidence.

Mr. Luckerath: Exception.

The Court: Exception allowed.

(Document received in evidence as Plaintiff's Exhibit No. 32.)

Cross-examination:

I followed Mr. Lonergan's representation inasfar as they related to silver, and the instructions he gave me with regard to silver contracts. In other words I repeated what he said to me and in those meetings. I am 48 years old, have had [fol. 133] part of a college education, and have made my home in Seattle for a good number of years. I was an architect for ten years in house construction and house contracting business. In connection with the contracts, I contacted prospective purchasers and helped to finance them. I quit this business to go into — army during the war. On my return from the war, I entered the first mortgage business and started in and organized the Continental Mortgage & Loan Company, a corporation with about

$2,500,000 of stock. I sold $750,000 worth of stock. I quit the Continental Mortgage & Loan Company in 1924, and went into the business of underwriting original issues of stock. In 1930 I became General Manager of the Washington Home Equipment Company, selling oil barrels and refrigerators in their local branch in the State of Washington. I was working under and in connection with the selling of the Continental Mortgage stock too. After quitting the Washington Home Equipment Company, I went into the life insurance business with the Lincoln National Life. I was with them about six months, and then with the Bankers Union for about a year and a half. I then went into the brokerage business and handled some accounts on the market. I handled my accounts through Dean Witter in Seattle. I had four or five accounts. I was not connected with Dean Witter at the time. I was just a broker, and handled my accounts individually, and placed them through their house. It was at this time that I became connected with the silver market in Seattle. While I was brokering accounts through Dean Witter, that is buying and selling, and executing my orders through that house, my customers were Axel Enquist, Mrs. Engle, Mrs. Mae Engle, Mrs. Spear, Miss Mildred Spear and Mrs. Carry W. Cropp. I also handled a small account for Mrs. McFadden. I did not handle an account for Mrs. Bollong, though I have [fol. 134] known her for 20 odd years. While I did not know all of them before I went into the silver market some are relatives of people I knew for a long time, for instance, Mrs. Maegher, is a sister of William Fend, who used to work for me when I was contracting 20 years ago. Some of these people I had invest in other enterprises, which I was connected with previously. For instance, Mrs. Spear is a stockholder of the Continental Mortgage & Loan Company, that was back in 1922, she was a customer. And some of the others I had dealings with until the silver market. I was familiar with the brokerage business as carried on by Dean Witter, and frequently made investments for people, placing margins. I was familiar with what would happen if there was a call for margin, and the people didn't bring in the margin. In case they didn't bring the margin in, they either had to cover or sell.

I first became associated with the silver market as a salesman for Martin & Company. In January, I had quite a few

customers and then I moved into the Insurance Building and had my own offices from January 1934, on. I started under the name of Norman Edward Company, at the time. The only formality in connection with my change of status of salesman to an associate broker was moving over into offices and having to take care of the expenses in that office and keeping accounts.

Defendant's Exhibit A-5, the letter from Louis Martin Company making me an associate broker. There was no added inducement as to commission when I became an associate broker. I had that right from the first instance. I had a contract when I first started to work with Louis Martin & Company.

(Defendant's Exhibit A-5 received in evidence.)

[fol. 135] At the meeting of salesmen, Mr. Lonergan explained the New York silver market, and other markets. Plaintiff's Exhibit A-1 was seen by us, and we were admonished and advised to read it, and one thing and another. I had one in my brokerage office. I think the salesmen, all of them saw this book. Mr. Lonergan stated to me and to all of those present, that the market was a thing no man could tell the high or low or any market. On repeated occasions he said that, or something to that effect. He told us the market could rise or fall three cents, the maximum, in any one day. That it was limited to that rise or fall in any one day's trading. In the assembled group he stated that he would not recommend frequent trading in and out, that is buying and selling frequently in the same option. I made talks at these meetings, generally about what I thought of silver, and one thing or another. Mr. Coventry made talks and others made talks from time to time. Mr. Lonergan explained repeatedly that the trading on the exchange was limited to the members of the exchange, and named the members, four of them. I am familiar with the Defendant's Exhibit A-2. It is a familiar form. It is called a signature card. Traders sign those cards. They do it on all markets, I know. By traders, I refer to customers. I obtained the signatures of the customers as evidenced on my card. I made it an invariable rule without exception. I believe that they are in my home some place in a bureau drawer. I don't know whether all of them are or not.

Referring to Defendant's Exhibit A-4, the top part is a form the customer receives confirming his purchase, and is

known as a Confirmation slip generally. There are confirmation slips for both purchases and sales. The second part of that exhibit is an order blank, known as the Order. The part indicated by "signed By" is where the customer [fol. 136] signed. It was the custom to attach the original order signed by the customer to the copy of the confirmation slip as a general practice.

After April, the company acted as an entity. It was done in this way. I gave every confirmation to Louis Martin, and we kept a duplicate copy of the customer and a duplicate of Louis Martin in the file. So this confirmation generally went out to the customers before April from Louis Martin Company. After I opened Norman Edward Company, there was placed in my file a form of receipt of the Norman Edward Company, and a copy of it, or a form designated Norman Edward Company, was prepared, the original of which was sent to the customer and the copy kept with my other.

Mr. Lonergan described a futures contract as a contract for the purchase of some commodity for delivery at a future time, and on that contract a certain amount was paid, a certain percentage of the whole was paid. The man took his delivery, he paid the balance of that up and took delivery of that commodity, whatever it happened to be. It was explained that futures contracts called for the delivery of the commodity in a definite month. The month is designated, but the day is not designated. The day is to be at the seller's option, and we were given 36 hours notice from the seller when we were to pick that up. I passed that definition on to the customers when they asked me about it. We were told repeatedly at the meetings of the salesmen that the margin was a matter to be adjusted between the individual broker and the customer, as far as the customer was concerned. This margin could be evidenced in any type of security acceptable to the broker, and any collateral to make up margin other than cash. Satisfactory bank credit could [fol. 137] be established in circumstances where the case warranted. After I became an associate broker my orders were placed with Louis Martin Company in the name of Norman Edward Company. I handled my accounts distinctly for my customers, as individual, but my account with Louis Martin Company was an aggregate account of the

total persons. In the Norman Edward Company I maintained a trading account "A" and a trading account "B", being two separate accounts. They were accounts of my own, where I put through some of my own commissions, partly my own and partly money I had borrowed, which were handled like the customers' accounts on the books. Subsequent to and prior to the time that I opened the Norman Edward Company there was turned over to Louis Martin Company the exact amount we received, irrespective of the amount of silver that was purchased. Our receipts corresponded with the receipts the customer received. Subsequent to the time that I opened the Norman Edward Company, all of this margin from my customers was credited to the account of Norman Edward Company on the books of the Louis Martin Company.

At the time I opened the Norman Edward Company account with Louis Martin Company, I believe I required a twelve cent margin from my customers. After the opening of Norman Edward Company, the Norman Edward Company account was called for margins in one or two instances, probably several times, I do not remember the dates. Several times we had to sell silver to lighten the account for the individual customer. When the margin was called upon from Norman Edward Company, we in turn called upon our customers to put up more margin. Norman Edward Company was furnished every day with a statement of our account showing our position daily with Louis Martin Company. Whenever our account fell below the required amount, we were required to bring up the amount. They [fol. 138] were not very particular about it, but when it got very dolorously out of line, there were times when it did get out of line. The exact amount of margin was not required at all times. I called on customers for margins. A. D. Barrall was called on for margin. He put his margin up in cash. I forget the exact amount. It seems to me it was along in March delivery, March silver, sometime in March. There was a time when I think Mrs. Spear's account needed more margin, and she sold, she put up more money, and I think she sold some silver. If I am not mistaken, the same thing happened to Mrs. Engle's account. I think she was obliged to sell some silver to lighten the account, about March or April. There might have been two or three others who sold silver.

During the time from April to June, a number of these accounts lost money in their trading, that is book losses. They hadn't sold, so they had not actually taken a loss. The books would show that they had a loss. Defendant's exhibit A-2 is the signature card signed by Norman Edwards Company, by myself. This is the regular form of signature card that was used. Orders for Norman Edward Company were quickly transmitted to Louis Martin Company, under the signature of then, Latimer, the bookkeeper or girl in my office. Prior to the time I opened the Norman Edward Company, the customers' accounts were signed in their own name, either by themselves, or by me, and subsequent to the time that I opened the Norman Edward's account, my customers' accounts were signed in the name of Norman Edward Company, and signed by myself, or one of my associates under the name of Norman Edward Company. I was rendered a statement at regular intervals during my relations with the Louis Martin Company, as Norman Edward Company. The accounts carried in my journal being Plaintiff's exhibit 25, and known as Trading [fol. 139] "A" and "B" accounts represented investments in trading in my own behalf.

Defendant's Exhibit A-8 is the signature card signed by Mrs. Mae Engle. I recognize her signature. Defendant's Exhibit A-9, is a portion of the signature card of my customers. Referring to the accounts handled by me with the Dean Witter & Company, the accounts were not in my name, they were held directly in the customer's name, all of them. The relationship between the customers I had with Dean Witter and the customers that I had after I established Norman Edward Company was distinctly different. They were handled differently.

Referring to Defendant's Exhibit A-1, the chart on Page 3, it is a graph showing the fluctuation, or comparative movement of prices between commodities and silver, over a period of years from 1914 to 1931, and illustrates the certificates of silver and the investment of silver as a defense against prospective inflation or deflation, by virtue of the fact that the silver prices parallel commodity prices. The most significant thing is that the purchasing price of silver with respect to the course in the price of commodities would remain relatively stationary. At the meetings there was probably an inference that it would take three to five

years to build up this market to a normal operating basis. Needless to say it would probably take some time before the tree took root and the blossoms would come, meaning more profits to the brokers would come. I was very thoroughly satisfied and very sincerely convinced that the market was a properly founded market and a good business to be in when I entered into it. I stated that I even intended to raise my boy to be a silver broker, on repeated occasions. I have no recollection of his (Lonergan) making any remarks subsequent to June 1934, to the effect that this [fol. 140] market would not go out of line substantially with other silver markets. He made these statements during the fall of 1933, and two or three months in 1934. Mr. Lonergan was the nominal head of the Seattle Silver Exchange. I do not know whether he was President or Manager, but I knew him as the head, or the authority. His advise was generally sought by all of the brokers and associate brokers and salesmen as to matters of policy, forms to be used, interpretation of newspaper articles and the like that were coming out. He certainly did not share in or get any of the commissions of Norman Edward Company. He had no interest in my commissions. He never held any position with Norman Edward Company. The silver was sold as per his instructions and teachings. I solicited advise as to when to sell, and when to buy for my customers, and frequently talked to Captain Coventry with reference to buying and selling at the most opportune time. I sometimes conferred with him—with both of them. Primarily my interest in making inquiries of Lonergan was to be sure that I complied with the rules and regulations of the exchange. He did not have direct authority to order me to buy or sell for any of my customers. His advise was simply accepted because of my confidence in him, and because of my respect for his knowledge on the subject. I do not know of any authority he had to order me to do anything, excepting when it came to sending out those notices, and it was by his demand that I sent out those notices.

Plaintiff's Exhibit 30 and 28 are among others, two of the margin letters that were sent out at the time the price of silver dropped, approximately after July 27th. Those letters are substantially copies of forms that were sent out by Louis Martin to their customers. That is the one of [fol. 141] July 28th appears to be so, but I don't think the

one dated August 23rd is. They are both margin letters, demands. As to what form to order out, I was told what to do. My recollection is that Mr. Lonergan had most of the telling to do at that time. After this was made out I took a copy of it to my personal attorney, Walter F. Meier, before I sent it out. Mr. Lonergan went up and had a talk with Mr. Meier, because I refused to send it out. I sent it out because I was told to by Mr. Meier. Mr. Meier told me that I had to comply with the requirements as a broker. Mr. Lonergan had no interest whatever in the account of Mae Engel. He had no interest in the 50% guarantee, evidenced by Plaintiff's Exhibit No. 14. I was the man who was interested in that account. My recollection with regard to that letter is that the letter primarily had to do with something that we asked her to do in the future, but she as far as I recall refused to do. This proposal was put up to her at the time, and wasn't acted on by her, and the letter was left there. I did not sign it—it was not signed. Lonergan was interested in building up volume as a whole, but not in any particular affairs of the brokers or their agents. It is true that I repeatedly advised my customers that dealing in silver was perfectly safe, and yet knew all the time that where they were only carried on margin with me, that on a failure of margin demands they would be wiped out, if there was a three cent fall of margin. But there is a lot of ramifications—the account could be sold before we got to the point of wiping out. There might be some small nominal loss, but at no time did I dream that it would be wiped out. I knew that as in the stock market, if margins were not put up, the customers were sold out. We were told by Mr. Lonergan that the investment in silver futures was safe as long as they, the customers, were pre-
[fol. 142] pared in any way whatever to take delivery when the delivery day came. Mr. Lonergan advised against selling in and out of the market. He advised that they wait for delivery dates. During the entire operation of the market, I was entirely satisfied that Mr. Lonergan believed sincerely at all times in the security, the value and the advantage of investments in silver.

(Defendant's Exhibits A-6, A-7, A-8 and A-9 received in evidence.)

Referring to the market on July 27th, 30th and 31st, during none of these days did I ever obtain a buyer for

200,000 ounces of silver, or any part of 200,000 ounces of silver, nor for several days after that was any offering to buy any silver made by me.

Q. Now let me ask you this question in reference to your statement on direct examination that there was a drop in the market. Do you refer to a drop in the spot silver market?

A. I referred in that instance to a drop in this market here.

Q. I asked you the spot silver market. You know what the spot silver market is as distinct from the futures, don't you?

A. Yes. I wasn't asked the question yesterday about the spot silver market.

Q. Oh, no, I am asking it now. I just want to find out whether it was what you referred to.

A. I referred to the drop in this market, not in the spot silver market.

Q. Not in the spot silver market?

A. No.

Q. You referred to the drop in the future market?

A. Yes.

[fol. 143] Mr. Luckerath: Now I ask that that testimony be stricken on the ground that it is with reference to a drop in the futures market, being in complete variance with the indictment.

The Court: Motion denied.

Mr. Luckerath: Exception.

The Court: Exception allowed.

Norman Edward Company was required to keep up with Louis Martin Company only the minimum margin. There could be a drop in the market without the customers being called upon, provided the market did not drop more than the difference between the customer's margin and the minimum required by Louis Martin Company. The customers were told about the minimum margin requirement, and that they would have to put up more margin at any time the market dropped more than four cents. They could put up margin, or sell, or lighten their account.

It was explained by Mr. Lonergan that if I failed to supply the margin requirement, some or all of the accounts

would be sold. Mr. Lonergan explained at the meetings to me, personally, that the margins required on the exchange were subject to change from time to time by members of the Board of Governors of the Exchange.

Redirect examination:

Plaintiff's Exhibit No. 29 is a letter from Louis Martin Company to Norman Edward Company, dated July 30th, calling for additional margins. I saw that letter in my own office in the Insurance Building, and received it through the mail from Louis Martin Company. I received it in Seattle, Washington.

(Letter received in evidence as Plaintiff's Exhibit No. 29.)

[fol. 144] Plaintiff's Exhibit No. 31, is a letter on the stationery of Louis Martin Company, dated August 24th, addressed to Norman Edward Company, asking for additional margins. I saw that in 204 American Bank Building. I received it from Mr. Lonergan.

(Letter received in evidence as Plaintiff's Exhibit No. 31:)

Testimony of GEORGE W. COOPER, Called as a Witness on Behalf of the United States

GEORGE W. COOPER, the witness called in behalf of the United States, being first duly sworn, testified as follows:

My name is George W. Cooper, and I live at 710 North Ainsworth Tacoma, State of Washington. I have been a resident of Tacoma for 28 years. At present I am 81 years old, my last birthday. I am acquainted with Norman E. Coles. Through him my wife and I bought some silver. I do not recall the exact amount purchased all told. The first purchase was about November 21, 1933. I saw Mr. Lonergan in the front office and talked with him a few minutes. He said my purchase was, our purchase would be good, first class, or something of that kind. Said our buy would be safe, if we invested in silver. I understood something about the silver market, from reading in the papers something about it, and I had some information from another party.

Cross-examination:

Defendant's Exhibit A-9, bears the signature of myself and my wife. Mr. Coles had us sign it on November 20th, 1933, at the office of Louis Martin Company. Mrs. Spear introduced us to Mr. Coles. She is the sister of my wife, Mrs. Cooper. Mrs. Spear previously had silver transactions with Mr. Coles, before we met him.

[fol. 145] I understood I was buying silver bullion at the time I signed the Defendant's A-9. I presume I read it. I do not know. I had an opportunity to read it. I do not know as Mr. Coles explained what a contract was. I thought I knew myself. He explained that a contract meant 500 ounces. The stocks I turned over to Mr. Walsh, I bought through Townsend & Company in Tacoma, and sustained quite a little loss in the value of it. I have been trading in stocks probably twelve or fifteen years. I was a general merchant for years, and later years was in the grocery business. I dealt in all kinds of merchandise in Maine, and grocery business in the city of Tacoma. I knew what margins were, I have always known what margins were. I knew some of my silver was sold. I can't remember the amount, but I knew there was a loss on the first sale. Both Mr. Coles and the president of the exchange told me the market was sure to make money, but from my experience as a business man, I knew you couldn't tell what will happen in the future. I know that a person cannot guarantee anything.

Mr. Hughes: If the Court please, one more question.

By Mr. Hughes:

Q. Mr. Cooper did you ever receive any of your money back with the exception of the two Fifty Dollar checks you received?

Mr. McDonald: If your Honor please, I object to that.

The Witness: No, I don't recall it.

(Colloquy.)

Mr. McDonald: I was just stating the objection, that is, [fol. 146] that losses or profits are not material to an issue presented by a mail fraud indictment, there being but two issues; one, was there a fraudulent scheme, device; second, were the mails used? Now, the only purpose of this is to

inflame the passions of the jury. The courts have repeatedly held that those elements are entirely immaterial. And of course, it arouses the sympathy of anyone. But sympathy and prejudice have no place in the trial of a suit, and therefore it is not material, it is not proper.

The Court: In view of all that has gone before with reference to what promises were alleged to have been made, and some of the statements of what statements were made with respect to safety, whether or not there would be any losses and so on, the objection is overruled.

Mr. McDonald: We may have an exception, please, Your Honor?

The Court: Exception allowed.

Testimony of Mrs. Abbie M. Cooper, Called as a Witness on Behalf of the United States

Mrs. Abbie M. Cooper, the witness called in behalf of the United States, being first duly sworn, testified as follows:

My name is Mary Abbie Cooper. I am the wife of George Cooper, who just testified that we live at 710 North Ainsworth, Tacoma, where we have resided for 28 years. I talked to Mr. Lonergan just before the investment, just long enough to say it was safe and sure.

[fol. 147] Cross-examination:

I left the transaction of business largely to my husband. I am a housewife, he is in business. Mrs. Spear is my sister, Mildred Spear, now Mrs. Carroll, is my niece. They had invested in silver with Mr. Coles, and suggested that we come over to see him.

(Witness excused.)

Testimony of George T. Goggin, Called as a Witness on Behalf of the United States

George T. Goggin, the witness called in behalf of the United States, being first duly sworn, testified as follows:

My name is George T. Goggin, I reside in Los Angeles, California, where I practice law. My sister is married to Mr. Lonergan.

In connection with the Seattle Metal Exchange, I will have to go back four or five years. Mr. Lonergan had explained to me on various occasions in discussing silver as an investment. He explained to me that silver was a commodity. This period of our conversation was right after the break in the stock market in 1929, also in the wheat market. And he had given a lot of study to the subject, and recommended me to various books, both put out by the Government, and also various authorities on silver. I studied those books that he recommended to me, and also from his discussion of the matter, I gained a fairly good knowledge of silver as a commodity.

[fol. 148] Along in 1932, we had some further conversations. Mr. Lonergan had opened up a small office in Seattle; was endeavoring to sell silver bullion. I suggested to him that if he believed I could fit into the picture, in relation to California with respect to silver, that I was very much interested and would like to be connected with him. We had considerable correspondence back and forth, and in December 1933, I made a trip to Seattle. He had at that time the Seattle Exchange well organized, and through my previous correspondence with him, he suggested to me the organization of P. A. Jordan & Company. That was an assumed name. I paid in about thirteen hundred dollars, three hundred dollars of this was a special margin to the Seattle Metal Exchange. P. A. Jordan & Company was a separate and distinct entity from the Seattle Metal Exchange. I was in control and operated it as a member of the Seattle Metal Exchange. I, George T. Goggin, was a member of the Exchange. P. A. Jordan & Company was my firm.

There were four active members on the Exchange—Pierce Lonergan, Louis Gill, John Walsh and myself. No one else traded on the floor. The operations of the Seattle Metal Exchange was similar to that of any other ordinary market dealing either in securities or commodities. It was a designated place where member brokers met and transacted business. One broker had an order to purchase. He came upon the floor of the Exchange and said, "I offer one

contract," or whatever the designated amount would be, at a certain price. If there were any bids, or if some other broker had a sale at some designated price, why, he would [fol. 149] say, I bid a certain figure. And if the price is met, there was a complete transaction. If the prices were not the same, there wasn't any transaction, and the broker did one of two things, he either allowed the offer to remain, or he would call back to his office and inform the office, or the floor man, or the customer's man, that he couldn't buy at that price, or he couldn't sell at that price, and then give him the quotation, that is, the bid and offer. And it may be that the bid and the offer would be changed to meet the transaction, if the offer or bid was still on the floor.

On the other hand, there were orders at the market, and the broker would bid a certain price, the seller would offer at a certain price, and so on the brokers would meet upon a particular price, and the transaction would be completed.

On the exchange there was a quotation board for spot silver, for silver for future delivery in the various four delivery months. The opening quotation would be either a nominal price, or be the bid, or offer, or an actual completed sale. When we speak of the market opening at a certain price, we might mean a nominal transaction setting the price. The expression, that the market closed at such and such a price, would be the closing offer, the closing bid, or the closing transaction, completed sale, or nominal price.

The opening quotation and closing quotation were dependent upon the bids and the offers, or a nominal bid, during that day. I had one customer in California, who was interested in the market for about 100,000 ounces, the Pacific National Bank of San Francisco. On July 27, 1934, they had no position on the market; they were entirely out of the market. I traded on the floor of the Seattle Metal [fol. 150] Exchange as a member on my own behalf and I dealt for the Pacific National Bank at San Francisco on the floor of the exchange. E. V. LaPlante, Edward Schmidt and M. A. Shephard were what I designate discretionary accounts of P. A. Jordan & Company. A discretionary account is an account of the broker and is analogous to what is termed in the stock market terminology as a street name. E. V. LaPlante, Edward Schmidt, and M. A. Shephard were friends of mine in whom I had a great deal of confidence. They did not actually deal in Seattle Metal Ex-

change; they never put up any margins nor withdrew any. Mr. LaPlante knew that I was using his name for an account as he received the information directly from me. He knew that I had come up here and opened a brokerage office to deal in silver, and he told me that if there was an opportunity to make any money in the silver market in Seattle, that he would be very much interested in it. I operated through his name, simply used his name. He wasn't actually making an investment. These transactions through these three names were handled by myself. The transactions handled through these accounts were the transactions of P. A. Jordan Company and were my transactions. There was held in either the Pacific National Bank in San Francisco or the First National Bank in Seattle, large round lots of silver contracts for bullion—the unit was approximately 25,000 ounces. There was credited to P. A. Jordan & Company these holdings, and in order to make commitments to the individual brokers on the exchange for their small units, it was necessary to break down these large 25,000 ounces orders to small 500 ounce orders. This was done through the names of E. W. LaPlante, Edward Schmidt and M. A. Shephard instead of using symbols, like A, B or C. These large amounts of silver held in the First National Bank of Seattle and the Pacific National Bank of San Francisco [fol. 151] were in the name of P. A. Jordan & Company and under my control. They were credited to P. A. Jordan & Co. or myself through Mr. Lonergan. I don't know who purchased those amounts of silver in the first instance, except in the instance of the Pacific National Bank in San Francisco, some purchases were made at my request. I was acting under my own direction. Mr. Lonergan consulted with me and his knowledge of silver was sufficient to advise me and from his advice and consultation the moves were predicated. I don't know whether Mr. Lonergan advised the breaking up these large chunks of silver at those two depositories named through the street accounts, or whether I suggested it, for the reason that I had been connected in the stock and bond business several years prior to becoming associated with Mr. Lonergan and that is the manner that most markets use, or brokers use. I didn't put any money personally into the silver and silver future contracts in the First National Bank here in Seattle and in the Pacific National Bank of San Francisco.

The silver futures contracts and the silver bullion on deposit in the First National Bank of Seattle and the Pacific National Bank of San Francisco, as to that silver I do not know whether it was acquired from margins or what the source of the money was. None outside the original one thousand dollars was deposited by me. Mr. Lonergan would know whether it was margins on the contracts for the purchase of future silver through the brokers of the Seattle Metal Exchange. P. A. Jordan, who was in the operation before I came up here, and certain of those accounts had been established by Mr. Lonergan. I had no control over the silver bullion or the contracts that were held in the name of Pierce Lonergan at the First National Bank of Seattle and P. A. Jordan & Company didn't have control of the silver in the name of Pierce Lonergan Company. Mr. Lonergan authorized breaking up those large amounts of 25,000 ounces of that silver through my street names [fol. 152] of E. V. LaPlante, Edward Schmidt and M. A. Shephard. It is not proper conclusion that the three names in the accounts of the books of P. A. Jordan & Company were authorized and directed by Mr. Lonergan, if you take the other circumstances into consideration. The money came from Mr. Lonergan on the contracts that were on deposit with the Pacific National Bank in San Francisco.

Plaintiff's Exhibit No. 37 are orders and confirmations handled through P. A. Jordan & Company for the accounts of E. V. LaPlante, Edward Schmidt and M. A. Shephard. Some of the writing is mine—the other writing I don't know, but those are the slips that evidence the sales for contracts of silver for those three accounts and Joe Walsh and H. E. Wilson. The slips evidencing the sales signed by E. V. LaPlante, Edward Schmidt and M. A. Shephard are my signatures.

Plaintiff's Exhibit No. 38 is purchase confirmation slips and the orders.

(Plaintiff's Exhibits Nos. 37 & 38 received in evidence.)

These exhibits evidence the consummated or completed transactions through P. A. Jordan & Company of E. V. LaPlante, Edward Schmidt and M. A. Shephard; they were the discretionary accounts to which I have referred. In making the sale or purchase on the floor of the exchange and when I executed it at the particular price, it was at my

discretion. Mr. Lonergan at times exercised discretion in making these completed sales; also prior to my coming up from California transactions in the names of E. V. LaPlante and M. A. Shephard were handled by Mr. Lonergan. No margins were deposited with me on these accounts, nor were any withdrawn by either LaPlante, Schmidt or Shephard.

Papers identified as Plaintiff's Exhibit No. 39 are contract slips between the selling and the buying broker, that [fol. 153] is between P. A. Jordan & Company and the other members of the exchange; some of the contracts are between Mr. Pierce Lonergan and P. A. Jordan & Company. These slips went from the seller to the buyer at the end of each day's tradin-s, showing what was purchased and what was sold.

(Plaintiff's Exhibit No. 39 received in evidence.)

Plaintiff's exhibit No. 40 is the pit cards used on the floor of the exchange—of P. A. Jordan & Company.

(Plaintiff's Exhibit No. 40 received in evidence.)

No margins were deposited or withdrawn by any person on the accounts of LaPlante, Schmidt, or Shephard. There was an account in my name with Pierce Lonergan Company on silver futures on the Seattle Metal Exchange; it was a discretionary account which I authorized Mr. Lonergan to use; I deposited approximately two hundred dollars; this was in the early inception of the market. The items shown in plaintiff's Exhibit No. 23, part B, an $800.00 deposit made on January 22, 1934, and a deposit of $13,650.00 made on March 28, 1934 were not deposited by me on those days. I don't know whether the entry is correct—nor did I deposit $1370.29 on June 4, 1934, nor did I withdraw the sum of $17,311.16 on July 28, 1934, from the Pierce Lonergan Company. I know nothing about these transactions other than what I have stated. Those transactions were at the discretion of Mr. Lonergan and I authorized Mr. Lonergan to use my name. I told him he could use it as a trading account if he wished when I originally gave him the two hundred dollars. I learned he was using my name in March, 1934. No California syndicate or person offered 200,000 ounces of silver through the P. A. Jordan & Company about July 27, 1934, nor did any California syn-

dicate prior thereto purchased two hundred thousand ounces of silver through P. A. Jordan & Company. I was on the [fol. 154] floor of the Seattle Metal Exchange July 27, 1934; I offered contracts for sale or future delivery of silver. I offered fifty contracts at the request of Mr. Lonergan. The reason that fifty contracts were offered was because it was immediately after legislation was passed by Congress taxing all trades in silver at fifty per cent of all profits. The trading on the exchange had completely dried up; there were no transactions for a period of two or three weeks and the brokers and their associates and salesmen were all inquiring what would happen to their investors with this tax situation placed on all silver transactions by the Government. Mr. Lonergan came to the conclusion that it would be necessary to see who was going to purchase their silver. He authorized me to offer the contracts and see if there were any purchasers—the fifty contracts or any part thereof were offered—there were no bids on the 27th. The close of the market on July 26th according to plaintiff's Exhibit No. 8 in the September option was 46⅞. The closing price in the evening of July 26 on September silver was 43⅞. The following trading day was Monday, July 30th. The same offer was made at the opening. On the first day fifty contracts were offered at 46⅝—there were no other offers that day—the closing that night at 43⅞; there were no purchases and no bids. On the next trading day I believe one of the brokers offered two or three contracts; I did not offer any the second day; there were no bids whatever that I know of on the 30th. The market closed that day at 40⅞ offered. The market had dropped three cents on the 27th and three cents on the 30th, or six points in three days. The market at 40⅞ on the 30th and on the 31st the opening offer was 41½ and closed that evening at 40½. From the close of the 30th and the close of the 31st there was only a 2/8 of one cent drop. On the first of August the opening was 41¾—closed at 41½. [fol. 155] There was a drop of something like six points from the 27th of July to the 1st of August. All the fifty contracts offered on July 27th were offered at Mr. Lonergan's request. Mr. Lonergan did not deposit any margin with P. A. Jordan & Company on the 27th of July, nor did I ever withdraw any sums from the Seattle Metal Exchange, or from the clearing house fund. I did not with-

draw the sum of $18,773.75 on the 27th day and the 30th day of July, 1934 from the clearing house of the Seattle Metal Exchange. P. A. Jordan & Company did not withdraw the sum of nine thousand and sixty dollars from Lonergan & Company; P. A. Jordan did not withdraw nine thousand seven hundred thirteen dollars and seventy-five cents from the clearing house account of the Seattle Metal Exchange. I did not withdraw the sum of $18,773.75, from the Clearing House of the Seattle Metal Exchange. P. A. Jordan & Company did not withdraw the sum of $18,120.00 on the 31st day of July 1934. I don't know of any withdrawal in that sum. Plaintiff's Exhibit No. 41 relates to the closing out of the P. A. Jordan account with the clearing house. The signature thereon is my signature. This is a letter addressed to P. A. Jordan & Co. It was placed on my desk by my bookkeeper, or given to me on the floor of the Exchange. It relates to two subjects.

(Plaintiff's Exhibit No. 41 received in evidence.)

The total sum thirty-six thousand nine hundred dollars was not received or withdrawn by me from the clearing house of the Seattle Metal Exchange. I do not know of such a total withdrawal. I did not receive the money; P. A. Jordan & Company carried a bank account with the National Bank of Commerce. Plaintiff's Exhibit No. 42 is withdrawals from the account. The principal banking business of the firm was carried on in Seattle. It had a bank account in the Security First National Bank of Los Angeles. [fol. 156] Exhibit No. 42 are checks drawn on the National Bank of Commerce by P. A. Jordan & Co. and evidence the account of P. A. Jordan & Co. as of May 31, 1934.

(Plaintiff's Exhibit No. 42 received in evidence.)

The signature on these checks, in plaintiff's Exhibit No. 43, are my signatures. These are also checks drawn on the bank account of P. A. Jordan, National Bank of Commerce, Seattle.

(Plaintiff's Exhibit No. 43 received in evidence.)

The funds of P. A. Jordan & Company at the National Bank of Commerce were deposited in the bank account from withdrawals from the First National Bank or taken from the vaults of P. A. Jordan & Company in the American Bank

Building. In most instances the deposits were made by me —occasionally by my bookkeeper—and withdrawals were made by myself or by my bookkeeper.

The first portion of Exhibit No. 43 evidences a payment in the sum of $500.00 to Pierce Lonergan Company. It was withdrawn by myself. I believe this money was turned over to Pierce Lonergan for the purpose of paying interest on the silver bullion in the First National Bank in Seattle. A portion of this bullion was assigned to the accounts of Schmidt or LaPlante and became the obligation of P. A. Jordan Company of that portion. It was not paid directly to the bank because the account at the First National Bank was carried in the name of Pierce Lonergan. There was an assignment made of a certain portion of that silver to P. A. Jordan Company, and perhaps you could designate Mr. Lonergan as agent. You can't make any conclusion that Mr. Lonergan was the agent of P. A. Jordan & Co. in accepting the five hundred dollars and paying on its silver bullion contracts at the First National Bank at Seattle.

[fol. 157] The second portion of Plaintiff's Exhibit No. 43 represents a withdrawal of the thousand dollars which was sent to the Pacific National Bank at San Francisco by me through the National Bank of Commerce. To the best of my knowledge it was either on the purchase through the Pacific National Bank of futures contracts from them, or for Shanghai taels or dollars. I was acting on behalf of P. A. Jordan Company. I may have consulted with Mr. Lonergan with respect to the purchase. Mr. Lonergan didn't order or direct transmittal of funds; he may have advised me. I would say he probably did.

The third portion of plaintiff's exhibit No. 43 represents transmittal of Sixteen Hundred and Seventy-Five Dollars from the National Bank of Commerce in Seattle for my account to the Pacific National Bank of San Francisco. I believe it also was for the purchase of Shanghai dollars to be delivered in the future. These two transmittals were made about July 16, 1934 and July 27, 1934. The account with the National Bank of Commerce in Seattle started about Mareh of 1934, and I do not believe it has ever been closed; I think it is still open; there may be a few dollars in it.

Plaintiff's Exhibit No. 44 is the account of P. A. Jordan and Company with the Security First National Bank of Los

Angeles. This account was opened August or September, 1934. After the close of transactions on the Seattle Metal Exchange my books were in my possession in Los Angeles. I transmitted them through the mails at the request of Mr. Lonergan and the Government, to Mr. Lonergan and have not seen them since. Exhibit No. 44 is the account of P. A. Jordan Co. with the Security First National Bank of Los Angeles. At that time P. A. Jordan Company had two accounts, one in the National Bank of Commerce in Seattle [fol. 158] and the other in the Security First National Bank of Los Angeles. The source of the Security First National Bank of Los Angeles account was a result of transmittal of funds from the account in the Pacific National Bank of San Francisco. They were transferred by my request from the Pacific National Bank of San Francisco. P. A. Jordan Company did not have a commercial account with the Pacific National Bank of San Francisco, having an account for the purchase or sale through the Trust Department, of commodities such as silver or Shanghai dollars. There was no balance in the Pacific National Bank of San Francisco. The withdrawals from Security National Bank of Los Angeles on September 4, 1934 and September 17, 1934, were made by me. I turned these funds over to Mr. Lonergan either in San Francisco or Los Angeles. He was there at the time. This closed the account in the Security First National Bank of Los Angeles. I put in one thousand dollars plus three hundred dollars as a special margin at the inception of the Seattle Metal Exchange, or at the inception of P. A. Jordan Company—these I never received back.

Regarding the purchase of Shanghai dollars by P. A. Jordan Company through the Pacific National Bank of San Francisco, there were various trades. Regarding the one on or about the 10th of August, 1934, I believe instructions were given to Mr. Kauffman to purchase for future delivery fifty thousand Shanghai dollars; I don't know who gave the instructions—there were so many transactions over the telephone and by wire that I don't recall; it was the transaction of P. A. Jordan Company; the purchase was made by P. A. Jordan Company. These negotiations were to be carried on by wire, telephone or letter—occasionally Mr. Lonergan would consult relative to the additional coverage in view of the fact that we were extend-

ing the time for those persons who desired to take up their [fol. 159] contracts and to get delivery of silver so that if they desired that, there would be sufficient silver on hand or contracted for to make delivery to them, and that was the purpose of Shanghai dollars. In making the purchase of 50,000 Shanghai dollars through the Pacific National Bank of San Francisco, they were ordered to make the purchase; they communicated back to us a price that such future contracts for the silver dollars could be purchased at, and they were instructed to so purchase it. $1,675.00 was transmitted from National Bank of Commerce. Undoubtedly I must have had a balance at the Pacific National Bank. They were held for three or four weeks and I telephoned to Mr. Kaufman and instructed him to obtain for me a price that those contracts could be sold for; they were eventually sold, I think, at a loss of approximately one hundred dollars; Government's Exhibit No. 44 was the balance of that account. That transaction took place during August and September 1934.

Prior to that time P. A. Jordan and Company had in the Pacific National Bank of San Francisco, 150,000 ounces at one time; it must have been in the months of May or June 1934 and before July 27, 1934. Those 150,000 ounces were for the future delivery of silver—contracts for the future delivery of silver. This was arranged through negotiations of a Mr. McKeig of San Francisco, who subsequently intended to become an associated member of the exchange through P. A. Jordan and Company. Mr. McKeig made arrangements with Mr. Kauffman of the Pacific National Bank to purchase 150,000 ounces. This was a transaction of P. A. Jordan and Company; I think Mr. Lonergan negotiated with Mr. McKeig regarding the opening of the account. I was not acting under the supervision, direction or orders of Mr. Lonergan at the time the silver futures contracts were purchased; we consulted together and he [fol. 160] advised me. He thought it would probably be to my advantage to open up this account with McKeig. The margins placed on this account were transmitted by Mr. Walsh and myself, a portion of which was received from the vaults and a portion from the bank. It was the money of P. A. Jordan Company, in this respect, that P. A. Jordan Company acquired that money through a loan, putting up other negotiable instruments or other evidences

of security. The loan was not made from the clearing house account; money was not obtained by me from Lonergan or Walsh, and they did not obtain it from the clearing house account. The money may have been borrowed either from the Louis Martin Company or from the Pierce Lonergan Company; all three of us handled the negotiations leading up to the payment of margins on the 150,000 ounces of silver. It is not a fact that Mr. Lonergan obtained the money for those margins. I didn't think that I was acting in capacity of intermediary.

On May 8, 1934, it was sent from the First National Bank of Seattle, Washington to the Pacific National Bank of San Francisco on a transmittal by the First National Bank, with instructions that the funds were not to be paid or released without the written consent of P. S. Jordan Company. These instructions bear my signature. I am not sure that the 150,000 ounces were all purchased at one time. This 150,000 ounces was a different transaction from the 100,000 ounces sold. The 100,000 ounces was a sale on this local exchange; it was in connection with this 100,000 ounces that the three thousand dollars were transmitted to the Pacific National Bank and was a transaction of P. A. Jordan Company; the transaction for the 150,000 ounces was a [fol. 161] transaction by Pierce Lonergan Company and not be P. A. Jordan Company. The transaction by P. A. Jordan Company was about the 5th or 6th of May. The transaction Mr. Lonergan had with the Pacific National Bank of San Francisco was in April, I believe. That transaction was for 150,000 ounces silver for future delivery. Subsequently additional margin was placed with the First National Bank and they purchased an additional 50,000, making a total of 150,000; that was a transaction of Pierce Lonergan. I had no particular fixed compensation from P. A. Jordan Company; Mr. Lonergan assured me there would be sufficient business placed with P. A. Jordan Company to justify my leaving the position I had in Los Angeles, where I was getting about two hundred and fifty dollars a month.

Cross-examination:

At present I am a practicing lawyer; before coming to Seattle and becoming interested in the silver market here I was with the brokerage firm of Lieb-Keystone Company,

members of the San Francisco Stock Exchange, San Francisco Curb Exchange, the Los Angeles Stock Exchange and Curb Exchange and associate members of the New York Stock Exchange. I was in charge of the billing department and also assisted in the order department; I transmitted all orders to buy or sell securities in either the San Francisco Stock Exchange or the Los Angeles Stock Exchange; I was with them in Los Angeles about one and one-half to two years. I first got interested in silver about 1930 through Mr. Lonergan and about 1930 Mr. Lonergan was in Los Angeles and right after the stock and com- [fol. 162] modity crash he was telling me that about the only basic commodity that would be a safe investment for the public generally would be silver, and that he would recommend and advise that all investors with any money at all invest and buy silver. We discussed this during the period of 1930, 1931, 1932 and 1933. Mr. Lonergan made extensive studies and was probably about the only authority on the Pacific Coast regarding silver; he made extensive studies of commodity exchanges; he was quite enthusiastic about silver as a commodity and as an investment—that is silver bullion. The relationship between the broker and his customer upon the Seattle Metal Exchange was entered into by an agreement of the customer with the broker, which is evidenced by that exhibit, the signature card, which was shown to the jury and the Court. The customer would instruct his broker to purchase for him either silver bullion or future contracts. The customer would place a margin requirement with the broker; the money was deposited with the broker; subsequently the customer would instruct the broker to make some particular commitment for him; maybe on the same day or maybe a few days later the customer would give an order to the broker to buy or sell silver for his account. The customer ordered the broker to purchase contracts for his account; as far as the customer dealing with the broker was concerned, he had to look to the broker for delivery of his silver. There was a contractual relationship between the broker and the customer only. If an order was made to buy silver the broker was the one that would have to deliver silver to him, or if he made an order to sell silver the customer would be the one that would have to deliver to the broker. [fol. 163] The relationship between the customer and the

broker went no further. The Seattle Metal Exchange was merely an association, provided facilities for the trading of its member brokers, could be analogous to the Elk's Club, and have its various members. No one else was permitted on the exchange except the member brokers to trade. The brokers would enter into contracts between themselves for the purchase or sale of future delivery of silver; that was a contract limited to the brokers themselves. The customer of the broker had absolutely no interest in that contract and could not look to the other broker for fulfillment. There was absolutely no right of subrogation by the customer to the rights of his broker in the contract with the other member broker. As to the contract between member brokers, there was no obligation on the part of the several brokers to perform these contracts before the delivery date mentioned in the contract for delivery of the silver. The only thing that was required of the broker was that he be in position to make delivery of silver bullion; and on the other hand, that the other broker be in a position to turn over the actual cash for the purchase of that silver. The clearing house was a separate entity, separate, distinct, apart from the Exchange. The member brokers of the exchange were also members of the clearing house; the clearing house was, as the term indicates, a place where transactions were cleared through. If a broker had purchased, say, for a client of his in Tacoma a contract for, say, June silver, and another client of his, say, in Spokane, ordered the sale of June silver, the clearing house [fol. 164] would match, as the term is used, would match those orders and there would be no requirement to put up any margin with the clearing house. In other words, the only requirement was that the brokers keep their net balance with the clearing house; the exchange and the clearing house were separate entities—formed for different purposes. The clearing house was merely to insure delivery of silver when delivery date came, to the member brokers, and through the member brokers to the customers. The clearing house was just the assignee of the *of the* brokers' contracts, the broker making an assignment, so to speak, of those particular contracts and the clearing house would enforce those contracts between brokers. The practice of the clearing house was similar to the practice of the clearing house

of the Los Angeles Stock Exchange or the San Francisco Stock Exchange clearing house. At the time delivery date came due on contracts there would be an actual delivery made. There were not facilities on the exchange for transactions on the spot silver market. Spot silver was merely transactions between brokers—it would be transacted at any time. They sold at any convenient time they had either on the floor of the exchange or otherwise. P. A. Jordan Company was formed at the inception of the Seattle Metal Exchange and acted both as a dealer and a broker. However, the function was more to act as a dealer broker. In other words, acted, as sometimes designated in the stock exchange, as a specialist and odd lot dealer. I mean by dealer a broker who made arrangements for the sale of silver futures or silver bullion, and would sell to other members of the exchange for their particular accounts. He [fol. 165] is generally a seller although not necessarily so. I took over the operations of P. A. Jordan Company in December 1933; Mr. Lonergan was authorized by me to make arrangements in the operations and to keep the P. A. Jordan Company in existence until I arrived. He did this to aid me in building up the P. A. Jordan Company at my request. It was intended that P. A. Jordan Company would open up small brokerage offices in California. One instance was Mr. McKeig, who made arrangements with the Pacific National Bank on that particular account, and the other existing brokers in San Francisco and Los Angeles—they were to be associate members of P. A. Jordan & Company. The company was formed to handle Pacific Coast business in future trading in Silver, especially with relationship to the bank. When I took over the operation of the company I sought Mr. Lonergan's advice and counsel in business matters. I was the actual manager and operator of the P. A. Jordan & Company; Mr. Lonergan had no interest in any commissions or any profits that were made by any of the member brokerage companies on the Seattle Metal Exchange; especially he didn't have any with P. A. Jordan & Company. It was the purpose of P. A. Jordan & Company to act as a seller and to buy various accounts that were assigned to P. A. Jordan & Company, such as the account of the Pacific National Bank in San Francisco. Instead of having the Pacific National Bank act as the seller on the floor of the exchange, because their

commitments were in large amounts of 100,000 ounces, they were assigned to the various so-called street accounts and broken up into small 500 ounce lots.

I am familiar with the exchange operations in regard to [fol. 166] street accounts in relation to the Los Angeles stock exchange; it was customary to use street names in dealing on that exchange very frequently; it is a common custom in instances of specialists and odd lot dealers to use street names on accounts. Congress passed the Silver Purchase Act on June 19, 1934, a month or so before the close. This act and its effects was discussed among the brokers and the salesmen and customers of all of the brokerage firms; they were very solicitous about that Congressional Act. There were no copies of the act available for about two weeks after the 19th of June. The effect of the Silver Purchasing Act was almost an immediate stopping or cessation of any buying power or any transactions at all; and in New York from reports that we received the same condition existed. It had this effect because the Act of Congress demanded that on all purchases of silver where a profit would ensue there would be a 50 percent tax; likewise, on a sale where the customer had a loss he could not off-set his loss against his profit. In other words, we came to the conclusion from reading the Act itself that if a person made a five hundred dollar profit he would be taxed 50 percent, or two hundred and fifty dollars, and if he on another transaction lost five hundred dollars, he could not off-set that loss of five hundred dollars against the profit of five hundred dollars. In other words, a person could hardly trade on the market. The subsequent effect of the Act was the close of the futures market in Seattle and in New York. There was no activity or buying activity on this market. No one was willing to buy when this Act was passed. The reason for offering 25,000 ounces was the fact [fol. 167] that trading in New York was not on a basis of 500 ounces as was being operated on this market, but in the total amount of 25,000 ounces. It was determined that it would be for the best interest to find out whether there was anyone at all interested in silver, even if they could buy on this market, and consequently sell on the New York market, and would take the 25,000 ounces and make a profit. The offer was made to permit buyers, if there were any, the opportunity of supporting this market, or in other

words, to buy in this market and to sell in outside markets at a profit. It was a bona fide offer to establish whether or not there was any bona fide offer from any bidders on the market at all. It was done because activity on the market had practically ceased after the passage of the Silver Purchasing Act. There was a resolution passed by the members of the exchange preventing any short selling; it was instigated by a gathering of those various salesmen that Mr. Coventry and Mr. Coles were associated with. The Board of Governors decided it would not be for the best interests to close the exchange. The resolution was then passed by the Board of Governors that no short sales could be made on the market; that they would all have to be legitimate sales by those who were long or had a position on the market. The effect of that resolution was to prevent any broker from selling or offering to sell on the exchange, silver or any one other than a customer who had contracted to buy silver. It was done at the request of the various associate brokers and notices were posted in all brokerage offices of that resolution. On Monday, June 30, an offer to sell was made by Louis Martin Company, I think by Mr. Walsh, on the floor of the exchange, offering five, ten [fol. 168] contracts, whatever it happened to be; there was a very small, insignificant amount—500 or 1000 ounces of silver. That offer was on behalf of some customer who wished to get out of the market. Mr. Walsh was displaying a telegram on the floor of the exchange. There was no one again on that day willing to buy the amount of silver offered on the market for even one contract. No one was willing to buy any amount of silver at all. On Tuesday, July 31, the same condition existed—small offers were made and there was absolutely no buying. These offers were made on behalf of customers who wished to sell their silver and get out of the market. No one was willing to buy; I believe the offers were made at the market—at any price. The exchange kept open after July 31 until the Nationalization Proclamation by the President of the United States prohibiting further trading, I believe the 9th or 10th of August; that concluded all trading. I don't believe there were any offers or bids at all between August 1 or August 9th by anyone. I testified on direct examination regarding Government's Exhibit No. 41, that I did not receive this sum of money; no such sum was available,

but that sum of $18,120.00 represented a credit. That was a bookkeeping entry in which I receipted for this amount to close out the balance that would be due on the contracts that are set forth here if the actual contracts had to be fulfilled.

At the time the clearing house was closed P. A. Jordan & Company had sold more contracts to the other brokers than they had purchased. The contracts of P. A. Jordan & Company, and of the other brokers as well, at that time were assigned to the clearing house association and the [fol. 169] balance which would be due to P. A. Jordan & Company, and on the books of the clearing house, would represent a credit in favor of P. A. Jordan & Company as against the other brokers who were the other contracting parties. This eighteen thousand dollars represented a credit against the clearing house association; and by this transmittal letter from the clearing house association, that cleared the books of the clearing house and P. A. Jordan & Company was then to look to the individual brokers to show a credit of P. A. Jordan & Company of whatever amount it happened to be, comprising this eighteen thousand dollars. The other brokers, or some of them, would owe P. A. Jordan & Company that sum of money. In closing out the books of the clearing house the same transaction was gone through with the several brokers. That particular credit of eighteen thousand dollars was later released to the brokers from whom it was due for the purpose of saving those brokers from going into receivership. It was further done because if the brokers went into the hands of receivers the customers of the various brokerage houses would be liable for their unpaid balances due on their contracts, and a receiver could more or less go out and enforce the collection of those accounts from those customers for whatever the deficit might be. If I had attempted to collect the eighteen thousand dollars it would have forced the brokers into receivership and I didn't want to force that issue upon them.

As to my testimony that no margins were put up on the street accounts, I testified no cash was put up, but what was put up was the assignment for future delivery on silver [fol. 170] for some other market, or assignment for receipt of actual bullion. The margin that was put up for security may be in any form of security, and in case of these street

accounts they were all secured, while not by actual cash margin, by margins representing actual silver bullion, or contracts for the purchase of silver bullion.

Referring to Government's Exhibit 23-B, which was the discretionary account with Pierce Lonergan Company in my name, and the deposit of fourteen thousand dollars and a withdrawal of seventeen thousand dollars, I didn't get this sum of money; neither the deposits represented cash as such in dollars and cents, nor the withdrawals did not represent cash in dollars and cents, but represented a credit of that money either deposited or withdrawn. In other words, what that actually represented would be the accounts carried by Pierce Lonergan Company in either the First National Bank in Seattle or the Pacific National Bank in San Francisco, against which there were expenditures in carrying the silver; interest charges and charges on the retention and depositing of this silver bullion; credits were also made to that account. Reports over the teletype coming directly from New York showed purchases on the New York stock exchange by an unknown buyer, and further that it was suspected the United States Treasury through Secretary Morgenthau was making these purchases. The report that the United States Government was supporting the market in New York appeared in the newspapers as well, and in the brokerage reports of various brokerage houses, including E. A. Pierce and Russell Miller.

Defendant's Exhibit A-1, the book entitled "The Silver [fol. 171] Market" was prepared by the United States Department of Commerce and states that Handy & Harman set the official price; they circulated the information in their booklet called the "Silver Market" that the Government did purchase silver from the period May to July 17, 1934. In their pamphlet, the annual review of the silver market published by Handy and Harman in 1934, it discusses the silver market for the whole year and reaffirms the reports that originally came out from Handy & Harman to the member brokers of the Seattle Metal Exchange. It was common knowledge that the Government was the only buyer, or practically the only buyer, in the New York market. The Board of Governors of the New York exchange voted to close the New York market at the time of the President's Proclamation on August 9th. On the same day

a meeting of the Seattle Metal Exchange was had and they also passed a resolution closing the market.

Referring to the 50,000 Shanghai dollars purchased about August 10, I testified in my direct examination the reason for purchasing that silver was to give the opportunity to any investor who desired silver at that date or a subsequent date an opportunity, and inasmuch as there was a nationalization of silver and the Government prohibited the purchase and sale of silver in the United States, that the Shanghai silver was the only silver which would be available for delivery. The purpose was to permit any customer who wished, to reinstate his account and take his silver, even though his account had been wiped out by the drop in the market. Money for the purpose of these Shanghai dollars [fol. 172] was in the National Bank of Commerce. I do not know the source of that money at the present time, however, money was advanced or borrowed from Mr. Lonergan for the account of P. A. Jordan & Company from time to time, as well as from Louis Martin Company. I know of no instance where investors who were notified that their accounts were wiped out came in and offered the balance due on their contracts and could not take a delivery or were given silver as called for by the contract. I know of instances where they were given the silver. I don't believe anybody wanted their silver after the crash of July 1934. There were over 25,000 ounces of silver bullion down in the First National Bank of Seattle. I understand that Eddy of Skinner & Eddy was interested with Mr. Lonergan in the acquiring or bringing of this silver from New York, the actual bullion, to Seattle and at that time I believe that Mr. Eddy advanced sufficient money so the silver could be brought here and deposited in the vaults here in Seattle. I don't know that the silver had been sold on July 23. It is my understanding that the silver was down there and there were also silver contracts.

In my testimony this morning I did not state that the use of street names was common or customary practice on exchanges; I said the use of street names was common with brokers—any brokers—he could either be a member of an exchange or not a member—Lieb-Keystone & Company—and if you give me a little time I could supply you with a number of names. The Seattle Metal Exchange market

letters were not sent out from the Seattle Metal Exchange; plaintiff's Exhibit No. 3 appears to be Seattle Silver Market [fol. 173] letters put out by Louis Martin Company. In my direct examination I did not state that a rumor was emanated in and around and from that market down there during the month of May, 1934, that the Government was going to stabilize silver and buy silver futures contracts; I said there was a rumor around the 15th of May that the Treasury Department was going to purchase silver—the first information I think came from E. A. Pierce Brokerage office.

(Witness excused.)

[fol. 174] Testimony of Mrs. Laura B. Spear, called as a witness on behalf of the United States

Direct examination:

My name is Mrs. Laura B. Spear; I reside in Washington, D. C. I am not married; I am a widow. In December and the fall of 1933 I resided in Seattle. About November 2, 1933 I saw Mr. Norman Coles, whom I had known for nine or ten years. About November 2, 1933 I loaned a thousand dollars to Mr. Lonergan in the Seattle Exchange; I think it was the first or second of November, 1933. I only talked to him once prior to the time I loaned him the thousand dollars. He told me I could not possibly lose my principal. Mr. Coles told me the same thing about the silver market and silver futures contract. I didn't see Mr. Lonergan until I decided to let him have the thousand dollars; he told me that if I would put up with him a thousand dollars or loan him a thousand dollars, he would pay me thirty dollars a month for the use of it. There was no talk nor did I agree to put one thousand dollars in silver future contracts at that time; my negotiations had been carried on through Mr. Coles.

Q. I will ask you what Mr. Coles stated to you with reference to your investing money in silver futures contracts?

Mr. McDonald: That is objected to unless Mr. Lonergan was present. There is no charge that Coles is a co-defendant, principal or anything but an independent broker.

The Court: Objection overruled.

Mr. McDonald: Exception.

[fol. 175] The Court: Exception allowed.

Q. What did Mr. Coles tell you, Mrs. Spear, about silver, and silver futures contracts?

A. He considered it a perfectly safe investment that would yield me a good return.

Q. I will ask you whether Mr. Coles stated anything about the position or the connection of the Seattle Metal Exchange with other world markets?

A. He said that they always stood behind this market.

Q. I will ask you whether he stated anything with reference to a possible clash or break in the Seattle Metal Exchange on the price of silver?

A. That the foreign markets would always — behind it.

Q. I will ask you, Mrs. Spear, whether Mr. Coles stated anything with reference to the moneys obtained, the margins that were paid in by investors?

A. That they were always—the principal was always kept in a trust fund.

Witness (continuing): I left the original one thousand dollars in there two months; Mr. Lonergan paid me Thirty dollars for each month; then I invested in silver futures, the thousand dollars. During the time I had this money invested Mr. Lonergan stated with reference to the safety of silver futures contracts that I could not possibly lose; I don't know how many silver contracts I purchased; my daughter did a great deal of the business; I left it up to her. I invested other money after the thousand dollars; I cannot give you the date of the next investment; it is all on Mr. [fol. 176] Cole's books and my daughter has the slips. I invested four thousand dollars in addition to the original one thousand dollars. The group of papers, Plaintiff's Exhibit No. 45, were sent to me by Mr. Coles. This (plaintiff identified portion of exhibit) was the amount I withdrew—this money.

(Plaintiff's Exhibit No. 45 received in evidence.)

I withdrew two hundred and fifty dollars at one time, and another time from Norman Edwards Company I withdrew two hundred and fifty dollars. I was to receive one hundred dollars or one hundred fifty dollars for my income. I don't

remember how many months I received one hundred fifty or one hundred dollars a month from Louis Martin Company. I left Seattle the 24th of July and before I left I drew out two hundred and fifty dollars; I went to Washington, D. C. with my daughter. I don't recognize the papers identified as plaintiff's Exhibit No. 46; I don't know what happened to silver futures contracts that I bought from Louis Martin Company.

Cross-examination:

I have known Mr. Norman Coles seven or eight years; he has acted as my broker with Dean Witter & Company; he was the first one who talked about silver to me; Mr. Coles was talking to me about silver in October 1933. I did not see Mr. Lonergan until about the first of November; the signature on Defendant's A-12 is my daughter's signature. That is the document Mr. Lonergan signed and delivered to me and my daughter when I gave him the thousand dollars.

(Defendant's Exhibit A-12 received in evidence.)

[fol. 177] The first time I ever met Mr. Lonergan was when he delivered that to me and I gave him the thousand dollars; he explained that the thirty dollars a month was three per cent a month; he didn't tell me it could only last for a limited time. Mr. Coles has been my broker for five or six years, acting as my stock broker. He bought and sold stocks for me and for my daughter. I didn't tell him that he was making too much money, although he repeatedly told me to remember that he would make a great deal more than the thirty dollars. I voluntarily took the money and placed it with the Seattle Metal Exchange to buy silver futures. My statements show that they came from Norman Edwards Company after a time but not at first. The statement you are indicating shows that there was transferred from Louis Martin Company on April 20, 1934, $612.72 to Norman Edwards Company with Mr. Cole's signature, but we were assured that Norman Edwards Company was simply connected with the Seattle Metal Exchange.

Witness Excused.

Testimony of MILDRED SPEAR CARROLL, called as a witness on behalf of the United States.

Direct examination:

My name is Mildred Spear Carroll; I am the daughter of Laura Spear; I reside in Washington, D. C. In the fall of 1933 I resided in Seattle; I saw Mr. Coles about the first of November 1933 with reference to buying silver futures. My mother, Mrs. Laura B. Spear, was with me at the time. I lived with my mother at that time.

fol. 178] Q. I will ask you what Mr. Coles stated?

Mr. McDonald: The point of my objection is that Mr. Coles being neither party nor charged nor principal that conversations had between him in the absence of the defendant are not binding.

Mr. Hughes: I haven't even had an opportunity to state the question yet.

The Court: Objection overruled.

Mr. McDonald: Exception.

The Court: Exception allowed.

By Mr. Hughes:

Q. Mrs. Carroll, I will ask you what Mr. Coles stated to you and your mother with reference to investments in silver futures contracts?

A. He asked us if we would like to buy silver futures. He said that he considered them absolutely safe and there would be no possibility of my mother losing any of her principal invested in silver futures.

Q. What did Mr. Coles say, if anything, with reference to the Seattle Metal Exchange and other exchanges in New York, London, Bombay and Shanghai?

A. He said there was no possibility of our losing our money because the other markets would step in and help this market out or buy, I don't understand just exactly how.

Q. In the event of a crash?

A. In the event of a crash in the Seattle market.

Q. I will ask you, Mrs. Carroll, what Mr. Coles stated to you or in your presence to your mother with reference fol. 179] to the margins or moneys that were paid in by ourself and other investors?

A. He told us that the moneys that we gave, the cash we gave, would be held intact as such, and we could draw on it at any time just as in a savings bank.

Witness (continuing): The gentleman sitting over there is Mr. Lonergan (indicating the defendant); he told us we could not possibly lose our money because the other markets would step in and help this market out. Mr. Lonergan told us the margins were held as if in a trust fund in the bank; he said they were absolutely safe. I purchased silver contracts individually in the amount of six hundred dollars. I think I bought 6,000 ounces. My name at that time was Mildred Spear. Plaintiff's Exhibit No. 45 represents transactions I have been testifying about and also the transfer of the account from Louis Martin Company to the Norman Edward Company. The account of Mrs. Laura B. Spear was a joint account and a portion of that money was mine also. I left Seattle in July, 1934—talked with Mr. Coles a few days before.

Q. What did you say and what did Mr. Coles say?

Mr. McDonald: I object to the conversations on the same ground already stated.

The Court: Objection overruled.

Mr. McDonald: Exception.

The Court: Exception allowed.

Q. What was said by you and what was said by Mr. Coles on that particular occasion?

A. A few days before I left I asked if everything was all [fol. 180] right to leave it as it was, and he said "Yes," that everything was in good shape.

Mr. McDonald: I move to strike that. It is clearly not within the rule. It is just a conversation, no act, no nothing to show under anything to bind this defendant.

The Court: The Motion is denied.

Mr. McDonald: Exception.

The Court: Exception allowed.

Witness (continuing): Plaintiff's Exhibit No. 47 came to me while I was in Washington, D. C. addressed to my mother. It was sent to me—my mother was residing in Maine at the time. Mother brought these with her; they went to Maine. I received Plaintiff's Exhibit No. 47 in Washington, D. C. They were forwarded to me through

the mails. The first one I received was that the account had been sold out completely; they referred to the silver futures market and that our account was in danger of being sold out. I gave them to Mr. Swenson.

Mr. Hughes: If the Court please, with that, I offer what has been marked for identification as Plaintiff's Exhibit No. 47.

Mr. McDonald: I object to it on the ground that there is no proper foundation laid, no connection with Lonergan, not binding, and immaterial.

The Court: In view of what has gone before touching the matter of relationship, the objection is overruled.

Mr. McDonald: Exception.

[fol. 181] The Court: Exception allowed.

Mr. Hughes: I make application to read it.

The Court: Plaintiff's Exhibit No. 47 is admitted and you may read it.

(Whereupon Mr. Hughes read aloud to the jury Plaintiff's Exhibit No. 47.)

(Plaintiff's Exhibit No. 47 admitted in evidence.)

Q. I will ask you if you ever recovered any portion or portions of the $600.00 invested by yourself?

A. No, sir, I didn't.

Mr. McDonald: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. McDonald: Exception.

The Court: Exception allowed.

Q. How much did you and your mother lose on your joint account?

Mr. McDonald: That is repetition and is only done for the purpose of inflaming the jury.

The Court: The objection is overruled.

Mr. McDonald: Exception.

The Court: Exception is allowed.

(Question read.)

A. In the neighborhood of four thousand dollars.

Mr. Hughes: That is all.

[fol. 182] Witness (continuing): Plaintiff's Exhibit No. 47 are notices that were sent from the Norman Edward Company to my mother—they were sent to Washington, I opened them—they were sent to me by Mr. Coles of the Norman Edward Company—After I received them I just kept them—I gave them to Mr. Swenson recently.

The Court: You didn't first give them to your mother and then later get them back and give them to Mr. Swenson?

The Witness: No; my mother had them. She lives with me and we brought them.

Mr. Hughes: I offer what has been marked for identification as Plaintiff's Exhibit No. 46.

The Court: The one heretofore withdrawn is now being reoffered.

Mr. McDonald: It is objected to on the grounds that there is no sufficient foundation laid.

The Court: Objection overruled; Plaintiff's 46 is now admitted.

Mr. McDonald: Exception.

The Court: Exception allowed.

Mr. Hughes: I ask for permission to read just a portion of this exhibit.

(Whereupon Mr. Hughes read aloud to the jury from Plaintiff's Exhibit 46.)

Mr. Hughes: That is all.

Cross-examination:

In the fall of 1933 I was teaching school; I have been [fol. 183] teaching school for about ten years; graduated from the University of Washington; graduated with A. B. degree; Mrs. Laura Spear is my mother. I knew Mr. Norman Coles since 1920 or 1921; he first brought to my attention the matter of silver future contracts. The signature on Defendant's Exhibit A-9 is the signature of my mother and myself, signed November 2, 1933. That is my signature at the bottom of Defendant's Exhibit A-12. It was delivered to me about November 1, at the time the one thousand dollars were given to Mr. Lonergan. Mr. Lonergan did not explain that for a limited time he would enter into this guarantee and that it would be subject to discontinuance by notice of either party. I did not recall reading

that "this account may be closed and our agreement terminated by you at any time upon thirty days notice given to me by you." I knew what a margin was. I understood that at any time the broker could call on me for more margin and that this agreement (witness examines signature card) was signed through Mr. Coles. It was not the agreement we entered into at first. The agreement entered into with Mr. Lonergan was terminated in sixty days at the suggestion of myself and of mother. I believe we went into Mr. Lonergan's office. We thought we could do better by buying silver futures ourselves instead of letting him use the money. I had confidence in Mr. Coles and he certainly had in Mr. Lonergan. I ceased to deal with Mr. Lonergan and the account and all the money was transferred to Louis Martin Company, then later the account was transferred to Norman Edward Company.

(Witness excused.)

[fol. 184] LUELLA K. MCFADDIN, called as a witness on behalf of the United States.

Direct examination:

My name is Luella K. McFaddin; I reside in Washington, D. C. My occupation is Assistant Research Aide, Department of the Interior, employed by the United States Government. In the summer and fall of 1933 I resided in Seattle, Washington; at that time I was a school teacher. I bought some silver futures contracts through Mr. Coles, I believe it was in November 1933; I bought from the Louis Martin Company, Mr. Coles was the agent. I had known him for several years—at least three.

Q. What did he tell you about the silver futures contract market?

A. He told me that it was——

Mr. McDonald: I want to object. There is no showing that Lonergan was present or that Coles sustained any such relationship as would under any theory render this admissible against the defendant Lonergan.

The Court: Objection overruled.

Mr. McDonald: Exception.

The Court: Exception allowed.

Q. What did Mr. Coles tell you about the silver futures market?

A. He told me that it was a way in which I could invest my money and be absolutely positive that I would not lose my principal and be certain that I could make some money on what I invested.

A. I will ask you what Mr. Coles stated with reference to the connection of this market, the Seattle Metal Exchange, and the other world markets, namely, New York, [fol. 185] London, Bombay and Shanghai?

A. He told me that the sun never sets on the silver market, that one of the markets of the world is open at all times, and that if anything should go wrong with this market, that the other markets would step in and bolster it up.

Q. I will ask you what he stated, if he stated anything, with reference to the safety of the margins that were placed in there by investors?

A. He said that a ten per cent margin was a perfectly safe margin and that is what I put up.

Q. I will ask you whether he stated or made any mention of a clearing house account or trust fund?

A. Yes, he did.

Q. What did he state in that connection?

A. He said that the money was kept in a trust fund and that any money that I put into the market was just as safe as an account in the Washington Mutual Savings Bank where at that time I had my savings account.

Q. I will ask you whether you had any conversation with Mr. Lonergan?

A. I did not.

Q. Did Mr. Coles tell you anything else or state anything else outside of what you have already mentioned?

A. Yes, he did.

Q. What did he say with reference to the Seattle Metal Exchange and silver futures contracts?

A. Well, he told me repeatedly that Mr. Lonergan whom he had every faith in and he considered that he knew more about silver——

[fol. 186] Mr. McDonald: Just a moment: If the Court please, I move to strike that answer as being immaterial, on the additional ground that Lonergan not being present,

and there is nothing to show that Lonergan ever authorized any such statement or ratified any such statement.

The Court: The objection is overruled.

Mr. McDonald: Exception.

The Court: Exception allowed. Finish your statement.

The Witness: He told me that he considered Mr. Lonergan the outstanding authority on silver, and that Mr. Lonergan and Mr. Walsh both had said that it was perfectly safe for me to go ahead and invest my money for the purpose that we both had in mind.

Q. What was that purpose you both had in mind?

A. I wanted to take my Master's degree at Columbia University and I was trying to get the additional money that would make it possible for me to do so.

Q. What did Mr. Coles tell you with reference to your purpose as you have outlined it?

A. Will you state that again please?

Q. What did Mr. Coles say about your contemplated purpose or your contemplated course back in Columbia?

A. He told me that if I invested my money here, that I couldn't lose it and that I would make—undoubtedly make money on it in sufficient amount that I could have that year at Columbia.

Q. And I will ask you upon what you relied when you purchased these silver futures contracts?

[fol. 187] A. I relied on Mr. Coles, and he repeatedly told me that he was relying on Mr. Lonergan.

Q. Did you rely on what Coles told you, too?

A. Yes, I did.

Q. And you made your first purchase about when, do you recall?

A. About November, 1933.

Q. And how much did you purchase at that time?

A. As near as I remember, it was one hundred dollars.

Q. Then what occurred after that?

A. I cashed in a life insurance policy that I had been carrying for about ten years.

Mr. McDonald: Now, if the Court please, I object to that and move to strike it as not responsive and wholly immaterial and improper.

The Court: The Court has ruled that she might show what she invested, but the statement about cashing in a life

insurance policy is stri-ken and the jury will disregard that. The remainder of her answer will stand.

Q. After the initial investment of one hundred dollars, did you invest any further sums?

A. Yes, I did.

Q. Will you tell the Court and jury what those investments were and the amounts?

A. I don't know the exact amounts but the total was nearly six hundred dollars. I don't know it exactly.

Q. Did you know the amount of silver you purchased, that is, the silver for future delivery?

[fol. 188] A. I did at the time. I don't know exactly what it was now.

Q. Now, I will ask you whether you invested any additional sum or sums in addition to this six hundred dollars?

A. No, I did not.

Q. Did you invest for anybody else?

A. Yes, I did.

Q. For whom?

A. My father.

Q. Your father's name is what?

A. U. S. McFaddin.

Q. Where is he at the present time?

A. He has died since then.

Q. How were these investments handled by you on behalf of your father?

A. They were handled in the same way as my own.

Q. That is, he turned the money over to you and you made the investment?

A. It was turned over to Mr. Coles.

Q. By whom?

A. By me.

Q. And do you recall how much you invested on behalf of your father?

A. Two hundred dollars.

Q. Now, Miss McFaddin, handing you what has been marked for identification as Plaintiff's Exhibit No. 48, I will ask you to state what that is, if you know?

A. These are the confirmations for the silver that I bought.

Q. And looking at the second portion of that exhibit, I [fol. 189] will ask you to state what that is?

A. You mean the second sheet?

Q. No; it is divided into two parts—the second portion of this exhibit 48.

A. These are my father's confirmations.

Q. Where have you seen those confirmations before?

A. They were sent to me through the mail.

Q. And they have been in whose possession since that time?

A. They were in my possession until I turned them back to Mr. Coles after this court proceeding was started.

Q. Mr. Coles or Mr. Swenson?

A. I turned them over—no, I turned them over to Mr. Swenson.

Q. That was the last you saw of them. They all refer to what, generally?

A. To the purchase of silver futures.

Mr. Hughes: With that, if the Court please, I offer in evidence what has been marked as Plaintiff's Exhibit No. 48.

Mr. McDonald: No objection.

The Court: Plaintiff's Exhibit No. 48 is now admitted.

(Whereupon Plaintiff's Exhibit No. 48 was received in evidence.)

Q. Now, Miss McFaddin, handing you what has been marked for identification as Plaintiff's Exhibit 49, I will ask you to state what that is, if you know?

A. Well, this had to do with my father's account.

Q. Have you ever seen that before?

[fol. 190] A. It was sent to me.

Q. Transmitted how?

A. Through the mail.

Q. I will ask you who opened the envelope?

A. I did.

Q. And it refers or relates to what?

A. To my father's silver account.

Mr. Hughes: If the Court please, I offer in evidence what has been marked for identification as Plaintiff's No. 49.

Mr. McDonald: I don't think there has been sufficient identification. I object, your Honor. I don't think they were sent with the authority on the part of the defendant Lonergan or with his knowledge. The mere fact that a person received a letter in the mail—I don't think that is sufficient identification. That is the ground of my objection.

The Court: The objection is overruled; Plaintiff's Exhibit No. 49 is admitted in evidence.

(Whereupon Plaintiff's Exhibit No. 49 is admitted in evidence.)

By Mr. Hughes:

Q. How old a man was your father at the time?
A. He was——

Mr. McDonald: I object to that.
The Court: Do you seek to show some circumstance? Perhaps it is not disputed that she represented her father.
Mr. McDonald: It is not disputed that she represented her father.
The Court: Very well; objection sustained.

(Whereupon Mr. Hughes read aloud to the jury Plaintiff's Exhibit No. 49.)

[fol. 191] Q. Now, Miss McFaddin, handing you what has been marked for identification as Plaintiff's Exhibit No. 50, I will ask you to state whether you have ever seen that before?
A. Yes, I have.
Q. And where have you seen that exhibit before?
A. Mr. Coles gave me this.
Q. Transmitted to you how?
A. He handed it to me.
Q. And those letters were executed by whom?
A. By Mr. Coles.
Q. The second portion of that exhibit is addressed to whom?
A. To me.
Q. The second group of letters?
A. My father.
Q. They were received by whom, if you know?
A. They were received by me.
Q. Transmitted how?
A. They were also handed to me.
Q. All of those letters relate to what subject matter?
A. To the closing of the silver account.
Q. On the contracts you and your father had purchased?
A. Yes.

Mr. Hughes: With that, if the Court please, I offer in evidence what has been marked for identification as Plaintiff's Exhibit No. 50.

Mr. McDonald: That is objected to, your Honor, on the [fol. 192] ground that there is nothing to connect the defendant Lonergan with this transaction.

The Court: Objection is overruled; Plaintiff's 50 is admitted.

Q. I will ask you whether you ever recovered any of the six hundred dollars you invested?

Mr. McDonald: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. McDonald: Exception.

The Court: Exception allowed.

A. No, I did not.

Q. I will ask you whether you ever recovered the two hundred dollars invested by you and on behalf of your father, U. S. McFaddin?

A. I did not.

Mr. McDonald: That is objected to.

The Court: Objection overruled.

Mr. McDonald: Exception.

The Court: Exception allowed.

Mr. Hughes: That is all.

Cross-examination:

I never attempted to collect from Mr. Coles; promises were made to me by him; I had known him for about three years; I had made a purchase of some insurance through him. I believe I would believe anything Mr. Coles told me. In 1933 I was teaching school in Seattle; I have a Bachelor's Degree from the University of Washington— [fol. 193] Bachelor of Science. I taught for about ten years; I met Mr. Coles many more than two or three times but not in a business way; I met him socially. I had heard of his business ability through other firms. I understood that I was putting up my money on margin and that any time the market went down I would have to put up more margin and if I did not do so I would lost my investment.

I have studied political economy a little. I made investigations and talked to other investors and with my banker—the Washington Mutual Bank. Everybody told me it was perfectly reliable and O. K. I signed the form Defendant's Exhibit D-2 known as signature card and read it before I signed it. At various times my contracts became due but I didn't accept delivery of any silver.

I signed the signature card with the understanding that that gave Mr. Coles the right to buy and sell on my account as he deemed right. It simply meant to me that I was giving Mr. Coles the right to take care of my account.

I have seen Mr. Lonergan but I have never talked with him.

(Witness excused.)

MARY SHATTUCK, called as a witness on behalf of the Plaintiff, having been first duly sworn, testifies as follows:

My name is Mary Elizabeth Shattuck. During the Fall of 1933 I lived at 1880 East 50th Street, (Seattle). I purchased Silver futures contracts the last of May, 1934. I bought those contracts from Mr. Coles. He told me it was just as good as Government bonds. I told him I had very little money to my credit, and just couldn't take a chance. He told me the market was open practically all of the twenty-[fol. 194] four hours around the world, and that we could always sell at a minutes notice, or buy the same way, and that every five points up, we would make, as I recall, 50 per cent. I said, "Now I have been in the market before, and I know what it means to be closed out, and I don't want to do anything that I would be called upon for more money", and he told me how much I should put down. It was twelve cents an ounce. He said there was no chance whatever that I would be wiped out. He would absolutely guarantee my account. I don't recall Mr. Cole saying anything about the clearing house account, or a trustee account.

I purchased 6000 ounces, and deposited a margin of twelve cents an ounce during May, 1934. I can't identify confirmations, but I can only recognize the form. I can't see the names.

Q. And did you receive confirmations on those contracts?
A. I did.

Q. I don't suppose that you would be able to see.

A. I am not able to identify anything.

Q. You can't even see that?

A. Well, I recognize the form, but I can't see names.

Q. Or can you identify anything further, if I should hand it to you?

A. Nothing at all, I can't see it.

Q. I will ask you whether you had occasion to receive any communications or any letters from the Norman Edwards Company during July?

A. Well, I had confirmations—oh, during July?

Q. Yes.

A. Well, I don't recall just the date, but when the market started to break I was about to take a trip to Spokane and I called up Mr. Coles and asked him if it was safe for me to [fol. 195] go. He said, "Certainly, don't worry at all, just forget it."

Q. Do you recall what time that was in relation to the crash?

Mr. McDonald: If the Court please, I would like an exception to all of these questions as to conversations in the absence of Mr. Lonergan.

The Court: Objection overruled, exception allowed.

Witness (continuing): After everything was over, I immediately went to Mr. Coles, who said he could do nothing, but that I could go see Mr. Lonergan. I did. I demanded my silver, or else the return of my money. He said I would have to see Mr. Coles about it. He couldn't do anything now.

I deposited money with the University National Bank, enough to pay for the rest of my contract. I had two conversations with Mr. Lonergan prior to the time I purchased silver futures contracts. I called up Mr. Lonergan on the telephone. I asked him what he thought would be perfectly safe to put down, so I would not have to put up any more money, and he told me twelve cents. He said the silver is bought and deposited in the First National Bank, and he would take me over and show it to me.

In the second conversation I called him up again. The market did not move very much, and I called him, and he practially repeated what he said in the first conversation.

I went down to see him the next time. We had a long conversation and talk about the silver question in a very

intellectual manner. I learned an awful lot about it. He said there was no worry whatever. He had put all his relatives in it, and he would not do that if he thought there was any doubt.

I had purchased the silver between the first and second [fol. 196] visits with Mr. Lonergan. I was acting on the representations of Mr. Coles.

Cross-examination:

I had never met Mr. Coles until I undertook this project. I called on him right after the salesman called on me. I have traded on margins before. I told Mr. Coles I had been in the market before, and knew what it is to be closed up. I had previously put up margins, and been unable to put up the balance, and had been closed up. I had so many losses on speculations in 1929 I could not name them all. I had been trading in margins about two years before I met Mr. Coles. Mr. Coles guaranteed my account. It was an oral guarantee. I can't recognize Mr. Lonergan unless I could get right up close to him. I did not go so far in looking Mr. Lonergan up, but I did look up Mr. Coles thoroughly before I purchased. I had read to me that it was the announced policy of the Government to increase the price to $1.29. I thought it was a law that it would not be changed in Roosevelt's administration, at least. As a matter of fact, it was changed, but I did not think it would be; it never entered my head that it might be; that is why I felt so sure about it. My dealings were with Mr. Coles just like I would go down to a broker's office. I put my money up with Mr. Coles. From my past trading on the stock market, I knew what a broker was. He is just like a salesman. They call for a margin if they wanted more. It never came from the salesman personally. I signed a card that looked like that, about that size. (Witness indicates signature card.) I understood that I was entering into a margin contract. (Witness excused.)

Testimony of Frank Given, Called as a Witness on Behalf of the United States

Mr. Frank Given, called as a witness on behalf of the Plaintiff, having been first duly sworn, testifies as follows:

[fol. 197] My name is Frank Given. I reside at Port Orchard, Washington. I am retired from the Postal serv-

ice. During the Fall of 1934 I was postmaster at Port Orchard (Washington). About that time, through Mr. John R. Walsh, the Louis Martin Co., I had dealings in silver futures contracts. The dealings and transactions were handled through him. I have known him since right after the war. He was cashier in the Kitsap County Bank there. I had business with him every day. He told me the Seattle Metal Exchange had connections with Shanghai, London, New York and Bombay. He said there could not be a break in the market here as long as the world market held up, because these other markets, if they dropped here, would purchase here, and would stabalize it. He said it was bound to rise, and I was convinced that it would myself. He said the margins that were paid would be deposited against the bullion in some Seattle bank over here. (Seattle.) I don't know what he called that fund.

My first purchase was made in December, 1933. Plaintiff's exhibit No. 51 is the statement I got.

(Plaintiff's exhibit No. 51 received as evidence.)

I received them from Louis Martin Co. through the mail. They were addressed to Frank Given, Port Orchard, Washington.

Mr. Hughes: With that, if the Court please, I am going to offer in evidence what has been marked for identification as Plaintiff's Exhibit No. 51.

Mr. McDonald: Objected to on the ground that there is not sufficient connection with the defendant Lonergan.

The Court: Objection overruled.

Mr. McDonald: No sufficient foundation laid.

[fol. 198] The Court: Exception allowed. Plaintiff's 51 admitted.

Q. Now, Mr. Given, I am going to hand you what has been marked for identification as Plaintiff's Exhibit No. 7, and I might say upon which count One of this indictment is predicated, and ask you to state what that is, what that exhibit is, if you know?

A. Well, it is an acknowledgment that I had sent in the order and the money for the silver futures.

Q. You received that from whom?

A. I received this through the mails from the Louis Martin Company.

Q. And the exhibit is addressed to whom?
A. Frank Given, Port Orchard, Washington.

Mr. Hughes: Now, if the Court please, upon that I am going to offer what has been marked for identification as Plaintiff's Exhibit No. 7, and upon which Count One of the indictment is predicated.

The Court: And upon the other?

Mr. Hughes: Based not only upon this evidence but the other evidence adduced here through the witness Coventry.

Mr. McDonald: Objected to on the ground no sufficient foundation laid in connection with the defendant Lonergan to show that it was authorized or that he acknowledged mailing this letter.

The Court: Objection overruled; exception allowed. Plaintiff's Exhibit 7 is admitted.

Mr. Hughes: At this time I move for leave of the Court to read this exhibit.

The Court: You may do so.

(Whereupon Mr. Hughes read aloud to the jury Plaintiff's Exhibit 7.)

[fol. 199] Q. Now, Mr. Given, handing you what has been marked for identification as Plaintiff's Exhibit No. 52, I will ask you to state what this exhibit is, if you know?

A. Well, this is one of the weekly letters from the Seattle Silver Market I received from the Louis Martin Company.

Q. How was that transmitted to you?

A. Through the United States Mails.

Q. And addressed to whom?

A. To Frank Given, Port Orchard, Washington.

Q. And enclosed in what?

A. These were sent in an envelope that was unsealed. They would send them out in volume and get a cheaper rate.

Q. This particular letter has been in whose possession, if you know?

A. Well, it has been in mine until I turned it over to Mr. Swanson.

Mr. Hughes: Now, if the Court please, with that I move for the introduction in evidence of what has been marked for identification as Plaintiff's Exhibit 52, predicated upon the testimony of this witness and also the testimony of Mr. Coventry, under which we introduced as one of the exhibits

in this case a whole group of market letters that were sent out, testimony to the effect that they were sent out in due course of business through the mails. I further point out to the Court that Count 2 of the indictment is predicated on this exhibit.

Mr. McDonald: I object, Your Honor, on the ground there is nothing to show that Lonergan ever appears on this letter, or anything ever brought to his attention or in any way binding on him, no proper foundation has been laid for the introduction of this against Defendant Lonergan.

The Court: Objection overruled.

[fol. 200] Mr. McDonald: Exception.

The Court: Exception allowed. Plaintiff's 52 is admitted.

(Plaintiff's Exhibit No. 52 received in evidence.)

Witness (continuing): When I received this letter and telegram with another man from Port Orchard, we came over to see Walsh. He told us that a lot of silver had been dumped on the market, and couldn't find any buyers, and they had to sell us out. He said we were wiped out according to their rules. Mr. Walsh said he would see that we were reimbursed if he had to sell his home. I never recovered any of the original $400.00.

Cross-examination:

I am sixty years old. I lived in Port Orchard thirty-two years. I have known Mr. Walsh since about 1919. He was cashier of the Kitsap County Bank in Port Orchard (Washington) from 1919 up until 1933. I *I* talked with Mr. Lonergan when he came to Port Orchard several time-, and addressed the Chamber of Commerce there on the subject of silver. After the meeting he stood there, and we all grouped around and asked him certain questions. A number of us were interested in it. There were about twenty people there —mostly professional and business men. At that time Mr. Walsh was still in the bank over there. What Mr. Lonergan said sounded alright. He was very enthusiastic. His address before the Chamber of Commerce was in the summer of 1933. His assertion was that silver always followed the price of wheat. He stated that commodities generally did. As a matter of fact, it did. I made my first purchase in the summer of 1933, through Louis Martin & Company. I did not come to Seattle. I sent him a check. The last purchase

I made was in January, 1934. I was intending to get the [fol. 201] silver and keep it for a rise. The contract I made in December in the Spring I was tendered the silver, or notified I could have it. That was in May, or June, and I just transferred that on to September futures. I thought I had June futures. I thought it would be more advisable to do that than to take the bullion. Defendant's Exhibit A-13, has the appearance of the one that I received.

(Defendant's Exhibit A-13 received in evidence.)

Defendant's A-14 is my handwriting. It is the letter I wrote to Mr. Walsh. It was in response to a letter Defendant's Exhibit A-13, transferring the silver.

(Defendant's Exhibit A-14 received in evidence.)

About the time I received the letter from Mr. Walsh (Defendant's Exhi-it A-13), I knew something was to be done about silver. There was quite a bit of agitation to inflate our currency to some extent with silver, which naturally would raise the price of it. Mr. Walsh explained after the crash that the Government had nationalized silver, and it was impossible to carry on any silver exchanges.

Recross-examination:

At the time of the Port Orchard meeting, when we were asking Mr. Lonergan about silver, he was dealing in spot silver only when I heard him.

(Witness excused.)

Testimony of AUBREY KNOFF, Called as a Witness on Behalf of the United States

AUBREY KNOFF, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

My name is John Aubrey Knoff. I am a musician. I had transactions in the silver futures market through Norman Coles, and though I was buying on margin there was absolutely nothing to fear of having to put up any money. He [fol. 202] told me the Seattle Metal Exchange was part of the world market. I invested $1,50.00 for which I gave him a note and paid this note with my check.

Q. And I will ask you whether you delivered anything else to Mr. Coles at the time you gave him this note?

Mr. McDonald: I object to that as immaterial, Your Honor.

The Court: Overruled.

Mr. McDonald: Exception.

The Court: Exception allowed.

A. Yes, I did, it was a check that I had cashed on an insurance policy.

Mr. McDonald: Now, if the Court please, I want to object and assign as misconduct on the part of the United States Attorney. Twice he has had women here crying on the stand. He has brought out once before matters purely for the purpose of prejudicing this defendant that have no bearing on this case. The only material thing is to show he paid the note. Now, the Courts have condemned this, whether they lose homes or insurance policies and so on. I feel that such a prejudicial atmosphere has been created that the defendant cannot have a fair trial in view of these repeated instance that have occurred. I assign it as error and move that the jury be withdrawn and a mistrial be declared.

The Court: Motion denied.

Mr. McDonald: Exception.

The Court: Exception allowed. Did you raise any objection to any portion of the answer?

Mr. McDonald: I move to strike it.

The Court: That portion after the word "check" in the last answer is stricken, and the jury will disregard it.

(Witness continuing): I contracted for 17,500 ounces for [fol. 203] future delivery. About July 28th Mr. Coles told me that everything would be all right. I do not remember the exact words. I did not see nor communicate with Mr. Lonergan. I wrote to Mr. Lonergan—none of my yetters were answered.

Q. I will ask you, Mr. Knoff, whether you recovered any of that $1050 that you invested in silver futures contracts on the 26th day of July, 1934, or any portion thereof?

Mr. McDonald: I object to it on the ground it is immaterial.

The Court: Objection overruled.

Mr. McDonald: Exception.
The Court: Exception allowed.

A. No.

Testimony of EDITH BOLLING, called as a Witness on Behalf of the United States

MRS. EDITH BOLLONG, the witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

My name is Edith G. Bollong. I reside in the City of Seattle, Washington. I operate an apartment house. I am a widow. I knew Mr. Norman Coles in November, 1933. I had several transactions in silver futures contracts. I dealt with Mr. Coles and Mr. Lonergan. I met Mr. Coles in his office in the Vance Building. He told me he was interesting some of his friends and people in the silver market. He told me there was no chance to lose, and every chance to make money. That in the event of a break, they would always be protected by the Shanghai buyers who would take up the contracts, and we would be in between the two markets, Shanghai and New York, as I understood it, and there was no change to lose in it at all. I told him I would see him later, and I would think it over. He told me we could deal on margins, and if I wanted to buy 1,000 ounces I could put [fol. 204] up $150.00. When I went to purchase the contracts, I took my money down to the American Bank Building. There I met Mr. Lonergan and Mr. Coles. (Witness identifies Mr. Lonergan.) Mr. Lonergan showed me some maps, and showed me the trend of silver, and how silver was going up, and how, in every depression, silver had gone up. He said there was a chance there to recover anything you might have lost in anything else, because this was a sure thing. You could not lose on it, but silver was going up, and would continue to go up. He told me there was every chance to win, and no chance to lose. I paid $150.00 at that time, and purchased 1,000 ounces of silver for future delivery. I further bought 500 ounces, and paid $50.00. I think it was about the first of the year—March, or something. Plaintiff's exhibits No. 55 are memorandums of the credits and deposits I had with Louis Martin & Company. The remaining portion of the exhibit is a letter from Norman Edwards Company, April 24, 1934. The remaining

exhibit is another letter from Norman Edwards Company, April 12th. The balance of the exhibits market letter of the Seattle Silver Market, November 22nd, 1933, I received through the mail from Louis Martin & Company.

Mr. McDonald: As to the so-called—I presume—confirmation slips, I am not entertaining any objection to those, but as to the letters of Norman Edwards Company, one of the date of April 24th, 1934, and one of April 12th, 1934, I submit there is no sufficient foundation laid and there are a great many statements in there that there is no showing that Lonergan had any knowledge or connection or authorized the ratification and for that reason I object to the two letters of the dates mentioned, and also the so-called market letter of November 22nd, 1933.

The Court: The two letters from Norman Edwards Company and other letters from the company, do they relate to [fol. 205] the subject of your transactions that you have spoken of here on the witness stand?

The Witness: Yes, they do.

The Court: The objection is overruled.

Mr. McDonald: Exception.

The Court: Exception allowed.

(Plaintiff's Exhibit No. 55 received in evidence.)

Witness (continuing): My total investment was $300.00. About July 26, 1934, we were notified that we would have to put up more margin. I went to the office of Louis Martin & Company, and met Mr. Walsh. He said someone had put on some silver, and there were no buyers, and consequently the price dropped, and we would have to put up more margin. Mr. Walsh said the best thing I could do would be to put up more margin, and they would put me back on the books. Mr. Walsh took me to Mr. Luckerath and Mr. Luckerath had me see Mr. Lonergan. I was in Mr. Luckerath's office. I went from one office to the other, and met Mr. Lonergan, and asked him what was best for me to do. He said to put up my money. He said we would get our silver, and I said well, in that case, I would put it up, but it's going to be in escrow. That was only about the 1st of August. Mr. Walsh drew up a paper for me to take to the Pacific National Bank. Plaintiff's Exhibit No. 57 is a letter written to Louis Martin & Company, making a demand for 3,000

ounces of silver that I had contracted for, signed by me. Mr. Walsh gave it to me, and he signed it, and then I handed it to Mr. Coventry, and he receipted for it. I signed it myself, and this is my signature. The transaction took place about August 16th.

(Plaintiff's Exhibit No. 57 received in evidence.)

Objection to Plaintiff's Exhibit No. 57. Not primary evidence; no foundation laid to connect defendant. Overruled, exception allowed.

I deposited $450.00 in the Pacific National Bank under an [fol. 206] escrow agreement, that when they delivered the silver, they would have the money. It represented the balance due on the contract. I never received the silver due on the contracts, which were for December delivery. I never recovered any of the $300.00 I invested in the silver futures contracts.

Cross-examination:

I have known Mr. Coles probably ten years. I knew him when he was an architect and builder. When he came back from the war, he was in the insurance business.

That is my signature on the card dated November 17, 1933. (Defendant's Exhibit A-9). I signed it in the office in the Insurance Building. Mr. Coles' signature is on that card. I read the card when I signed it. I signed in Mr. Coles' presence. He explained to me about margins. He told me they were selling it on margins. I got back the money I put in the Pacific National Bank in August.

(Witness excused.)

Testimony of W. R. McKnight, Called as a Witness in Behalf of the United States

W. R. McKnight, the witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination:

My full name is W. R. McKnight. I reside in the Waldorf Hotel, Seattle (Washington). My occupation is salesman. I was salesman for Norman Edwards Company during the

Spring of 1934. I made connection through Norman Coles, whom I have known since 1912. I have worked on and off with Mr. Coles for fifteen or sixteen years in the selling game, and worked for him most of the time. He had been trying to get me to come down and work for him selling silver. I had been thinking about it. The commissions were kind of small, and I was kind of hesitating. Mr. Coles [fol. 207] told me silver futures contracts was a good thing to get into. In explaining to me the business of selling silver, he said we had a connection with the other markets in the world. He told me it was the safest business he had seen, so far, as far as securities were concerned. He told me that the money that was paid in to buy silver futures was to go into a clearing house. I went over to see Mr. Lonergan. He told me he believed that everybody could make money by buying silver—or words to that effect. The gist of the conversation was that he thought buying silver was the safest investment a person could make at that time. I don't think he stated anything at that time as to what were done with the margins.

My employment with Norman Edwards Company commenced about March 1934, and continued up to the last part of August. I attended maybe four of the salesmen's meetings. One or two times Mr. Coles was in charge of the meeting. Captain Coventry was in charge once. Lonergan was present at all of the meetings, with the exception of a short one we had one afternoon. Lots of questions were asked for information. Whatever we wanted to find out, economics, a world market for silver. I cannot recall just what I stated to the customers in the sales talks. It is pretty hard to say. Of course, I brought in the fact that it was safe. In making representations to customers, I based the representations on several sources, from my own knowledge of securities, from world markets, from newspapers, and from Mr. Coles, and from information from Mr. Lonergan. I can't say on whose authority. I was working for Mr. Coles, and most of my information I obtained from Mr. Coles, and most of my instructions came from Mr. Coles. I received lots of information from Mr. Lonergan. I didn't receive any instructions from him. He never advised me about [fol. 208] making a sale, either at a sales meeting or any other occasion, with reference to statements to my clients, or with reference to how I should conduct my sales. I was

acting under the direction and authority of Mr. Coles. I didn't terminate my services with Norman Edwards Company at any definite time. It just went out of existance, and I went out with it.

Cross-examination:

I am forty-two years old, and have lived in Seattle (Washington) about thirty-two years. I have always been a salesman, except during the war. I was familiar with margin transactions, prior to my connection with Norman Edwards Company, and familiar with stock brokers' activities, and the manner in which they transacted stock brokerage business. It was in the newspapers that the administration was going to try to put silver to $1.29. Mr. Lonergan had no authority over me. Mr. Lonergan had no salesmen as far as I know. The sales meetings were the meetings of Norman Edwards Company, Gill & Company, Martin & Company, and P. A. Jordan Company. The P. A. Jordan Company was represented by Mr. Goggin. The purpose of the meetings were to discuss the silver market, the price of silver, and inform those present as to the changes in the market, different bills that were being passed in Congress, or up for passage. We knew that many outside influences might effect the price one way or another. Mr. Lonergan stated that the market could change one way or another, as much as three cents a day, and he stated to the brokers and salesmen that they should advise customers to keep themselves well margined, and that they should be in a position to take silver when it was deliverable.

At this meeting, Mr. Lonergan stated to the persons present, in discussing matters with customers, they should ad- [fol. 209] vise them that they should look to the broker they dealt with for the responsibility and performance of these contracts on silver futures. They were dealing with the broker.

Mr. Lonergan stated it would take some time before there would be enough silver so we could have a real operating silver exchange, and probably a foreign exchange bank. He stated it would take time to familiarize the people, the bankers and business men with the foreign exchange and silver as a commodity. I was under the impression there was only one exchange outside of Seattle in the whole

United States. He stated it was very essential to this program in making Seattle an extensive silver exchange that there be accumulated in the city of Seattle a large amount of silver. He stated that the Seattle Metal Exchange was an Association of brokers, and did not itself buy or sell, or contract to buy or sell silver. He stated at these meetings that he was acting as a broker, and also president of the exchange.

I do not know of any salesmen he ever had. To the best of my knowledge, Mr. Walsh, Mr. Goggan, Mr. Gill and Mr. Lonergan were operating independent of each other.

Mr. Lonergan explained that outside markets would support the Seattle market when prices were cheap enough here so that purchases could be made here as well as on the outside market at a profit.

Mr. Lonergan explained at the meetings that it was not necessary for a broker to take his margin in the form of cash. The customer could protect his account with any good security. The purpose of the margin was to secure the broker against loss in the performance of the contract by the customer. He said that the price of silver in the Seattle market would tend to be from three to three and one-half [fol. 210] cents higher than it would be in the New York Market, because the trading in the New York market was in lots of 25,000 ounces, and that here, on account of there not being such wealthy people, and so on, that in reducing it to 500 ounces there would be an expense which would necessitate the difference.

Redirect examination:

I do not think Mr. Lonergan said three and one-half points. He said the market would be higher here than it was there. He said the customer could deposit any kind of collateral, if it was good collateral. He didn't state what kind of collateral, except to say that it had to be good collateral.

(Witness excused.)

Testimony of MARY McGREW, Called as a Witness on Behalf of the United States

MARY E. McGREW, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

My name is Mary E. McGrew. I live at 204 Eleventh Avenue North (Seattle). I bought some silver futures contracts from Mr. McKnight.

Q. And what did he tell you about silver futures contracts?

Mr. McDonald: I object to statements made by McKnight in the absence of Lonergan. There is no showing that any statements made by salesmen working for independent brokers were authorized by Lonergan or ratified by Lonergan or in any way connected with him.

The Court: Objection overruled.

Mr. McDonald: Exception.

The Court: Exception allowed.

[fol. 211] Witness (continuing): Mr. McKnight told me everything good and rosy, which made me believe. He told me it was perfectly and absolutely good and safe. I invested only $120.00. I do not know the number of ounces of silver. I received lots of communications from Norman Edward Company.

Q. And I will ask you whether you ever recovered any of that $120.00 or any portion thereof?

Mr. McDonald: I object to that as being incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. McDonald: Exception.

The Court: Exception allowed.

Q. Did you recover your $120.00 or any portion thereof?
A. Not a cent of it.

Cross-examination:

I never saw anybody but Mr. McKnight.

(Witness excused.)

Testimony of J. I. Romer, Called as a Witness on Behalf of the United States

J. I. Romer, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

My name is J. I. Romer. I have been running a restaurant in Seattle, and I had dealin-s in contracts for the future delivery of silver with Mr. McKnight. He was the agent who sold me through Norman Edward Company, and Mr. Norman Coles also. Mr. McKnight tole me it was absolutely a positive fact to make a little money. It was as good as a bank, in fact better.

[fol. 212] Mr. McDonald: Just a moment, counsel. I want to reserve my objection to the statement made by Mr. McKnight or any salesman in the absence of Lonergan, anyone not a principal or co-defendant, not binding.

The Court: Overruled.

Mr. McDonald: Exception.

The Court: Exception allowed.

Witness (continuing): I invested $1,440.00, I think, and then I put up a $300.00 additional margin on 1,200 ounces, purchased at three different times. The first time, in May, 1934.

Plaintiff's Exhibit No. 59, I received through Mr. McKnight. Some of them came by mail, and some of them were handed to me. They relate to future delivery of silver.

Mr. Hughes: I offer what has been marked for identification as Plaintiff's Exhibit No. 59.

Mr. McDonald: Objected to on the ground there is no connection between the defendant on trial as shown, and therefore incompetent, irrelevant and immaterial as to him.

The Court: Objection overruled.

Mr. McDonald: Exception.

The Court: Exception allowed. 59 is admitted.

[fol. 213] "Referring to Plaintiff's Exhibit No. 30, I received that letter through the mail."

[fol. 214] (Plaintiff's Exhibit No. 59 received in evidence.)

Witness (continuing): I saw Mr. Lonergan after I put up an additional $300.00, before I put up the margin with Mr. Coles.

(Witness excused.)

Testimony of WILLIAM FEND, Called as a Witness on Behalf of the United States

WILLIAM FEND, the witness called in behalf of the Plaintiff, being first duly sworn, testified as follows:

My name is William Fend. I reside at 3045 Beacon Avenue, (Seattle). My occupation is a carpenter and builder.

I invested in silver futures in 1934 through Norman Coles. I never had occasion to talk to Mr. Lonergan.

Q. And I will ask you what Mr. Coles stated with reference to the silver futures market?

Mr. McDonald: I object to that, Mr. Coles not having been shown to have been an authorized agent in the control of Lonergan, and not being charged as principal or partner, and any conversations in the absence of Lonergan are not binding on the defendant Lonergan.

The Court: Overruled.

Mr. McDonald: Exception.

The Court: Exception allowed.

Q. What did Mr. Coles tell you about the silver market?

A. Well, he said it was a good investment, no chance to lose.

Q. Did he tell you anything, or did Mr. Coles say anything about the connection of the Seattle Metal Exchange with the other world markets?

[fol. 215] A. Yes; he did say it was connected with the world markets.

Q. What did Mr. Coles say with reference to what would occur in the event of a break in this market?

A. He said he would take care of that himself. He wouldn't call for any margin.

Q. Do you recall the total amount that you invested?

A. Between six and seven hundred dollars.

Q. Did you give Mr. Coles cash?

A. No, I gave him securities.

Q. Handing you what has been marked for identification as Plaintiffs Exhibit No. 60, I will ask you to state if you have ever seen that before?

A. Yes, that came through the mail.

Q. You received that from whom?

A. Well, I think it was through Norman Edwards Company, the company which Coles was associated with.

Q. It relates to what subject matter?

A. Silver futures.

The Court: That you have testified to?

The Witness: Yes.

Mr. Hughes: If the Court please, I offer now what has been marked for identification as Plaintiff's Exhibit No. 60.

Mr. McDonald: Objected to as not binding on the defendant Lonergan, no sufficient foundation laid for its admission in evidence.

The Court: Objection overruled.

Mr. McDonald: Exception.

The Court: Exception allowed; Plaintiff's 60 is admitted.

[fol. 216] (Plaintiff's Exhibit No. 60 received in evidence.)

Witness (continuing): Regarding plaintiff's Exhibit 61, they referred to the silver futures that they delivered. I received those exhibits through the mail. They were sent by Louis Martin Company, and relate to transactions I had through Norman Coles personally. That was the man I was doing business with.

(Plaintiff's Exhibit No. 61 received in evidence.)

Q. I will ask you, do you have a sister, Mrs. Harriett Maegher?

A. I have.

Q. I will ask you whether she had a conversation with Mr. Coles in your presence?

A. She did.

Q. Relate what occurred there during that first conversation?

Mr. McDonald: Before you answer, the same objection on the ground there is no showing that Lonergan was present or that any of these parties were in such relationship to make their testimony competent in the trial of this case.

The Court: Objection overruled.

Mr. McDonald: Exception.

The Court: Exception allowed. He may answer.

A. Mr. Coles thought it was a good investment so I told him about my sister, Mrs. Maegher—we pronounce it "M-a-r-r"—he said there was absolutely no chance to lose, so she invested $1500.00 in the proposition.

Q. Those representations made by Coles to your sister were made in your presence?

A. Yes, I told him I didn't like the idea of buying on [fol. 217] margin because these people had no margin to put up later on. He said it was a cinch. He would take care of it himself, if there was anything to put up.

Mr. McDonald: I move that the last part be stricken on the ground there is nothing to show that Lonergan authorized any such statement that he would put it up himself, as I understood him to say, if any margin was required he would put it up himself. How can you bind Lonergan by a statement of that kind?

The Court: Motion denied.

— McDonald: Exception.

The Court: Exception allowed.

Cross-examination:

The signature to defendant's Exhibit A-9, the second card is my signature. The other is Mr. Norman Coles', dated December 5, 1933. It is a written agreement I had with Mr. Coles, of the Norman Edwards Company for handling my margins in the purchase of silver.

I have known Mr. Coles for over twenty-five years.

At the time of signing the cards, I did not know Mr. Lonergan, and at no time had I met him.

Mr. Coles and I were together in building houses about twenty years ago.

(Witness excused.)

[fol. 218] Testimony of HARRIET MAEGHER, called as a witness on behalf of the United States.

Direct examination:

My name is Harriet Maegher; I reside in Seattle; I am a housewife—a widow. I had transactions or dealings in

silver futures contracts during the summer of 1933; I dealt through Mr. Coles.

Q. What did he tell you about the silver market?

Mr. McDonald: Same objection, your Honor, not binding on the defendant Lonergan.

The Court: Objection overruled.

Mr. McDonald: Exception.

The Court: Exception allowed. She may answer.

Witness (continuing): Mr. Coles told me there was no possible change to lose; he said the Seattle Metal Exchange was connected with Shanghai and New York; I purchased 12,000 ounces under these silver futures contracts; I invested $1,500.00 in December sometime. These papers (Plaintiff's Exhibit No. 62) I received from Louis Martin Company; they were addressed to myself; they have reference to the transaction I had in silver contracts.

(Plaintiff's Exhibit No. 62 received in evidence.)

Objection; no foundation connecting defendant; overruled; exception allowed.

Witness (continuing): After the crask I got my final notice and received a check for $107.00 and a few cents. I had no occasion to have a conversation with Mr. Walsh. I saw Mr. Coles after July 28, 1934.

Cross-examination:

The handwriting on Defendant's Exhibit A-9 is my hand- [fol. 219] writing. (Defendant examines signature card); the date is January 6, 1934. Mr. Coles didn't explain about margins; he said he would not have to ask for any margins. The money was put up as margins; I know what a margin is but I could not explain it to you. I know that Mr. Coles and Mr. Fend, my brother, have been close friends of many years standing.

(Witness excused.)

Testimony of Sarah Streepy, called as a witness on behalf of the United States.

Direct examination.

My name is Sarah Streepy; I live in the Ward Apartments (Seattle). I am a graduate nurse; I had dealings

in silver futures contracts through Mr. Coles; the first investment in these contracts was made around November 15, 1933.

Q. And I will ask you what Mr. Coles stated about the silver futures contracts market?

Mr. McDonald: Just a moment. Objected to, Your Honor, on the ground that Coles is not shown to be here as a party to this action or that he had such relationship to the defendant Lonergan as would bind Lonergan by any statements he might have made in the absence of Lonergan.

The Court: Objection overruled.

Mr. McDonald: Exception.

The Court: Exception allowed.

Witness (continuing): Mr. Coles said I couldn't possibly [fol. 220] lose; he said it was safer than a bank; I made an investment of $600.00 during the month of November 1933; I withdrew Fifty Dollars at one time and Thirty-five Dollars at another time; the balance remained with the Norman Edwards Company. The Exhibit, Plaintiff's No. 63, I received through the mails; part of them from Norman Edwards Company and part of them from the Louis Martin Company; they relate to transactions in silver—some silver I purchased, some sold and what I withdrew.

(Plaintiff's Exhibit No. 63 received in evidence.)

Exception; ground no foundation connecting defendant; overruled; exception allowed.

Cross-examination:

The signature on the third card from the back in Defendant's Exhibit A-9 is mine; the signature on the left of mine is Norman E. Coles, dated November 15, 1933. That was about the time of the first transaction. I had known Mr. Coles only a few days; I met him after reading an advertisement regarding passbooks. I read this contract, (signature card); I understood I was buying silver to be delivered in the future and I traded in and out of the market. When the first silver was deliverable I told Mr. Coles to buy some more and not take the silver.

(Witness excused.)

Testimony of GEORGE A. SIEGNER, called as a witness on behalf of the United States:

My name is George A. Siegner; I reside in Port Orchard, Washington; I am a druggist; I had transactions in silver futures during the year 1933. I dealt through Mr. Walsh, [fol. 221] whom I had known about twelve years. Mr. Walsh had resided in Port Orchard; during his residence in Port Orchard he was a bank cashier; he told me with reference to silver futures contracts in the silver market that it was a good buy; you took little or no chance on account of its being an imperishable commodity; there was a world market for it and it was bound to go up in price on account of the Government activity in the market. He said the Seattle Metal Exchange was connected with Shanghai and New York markets. My first purchases were silver futures contracts in 1933; the first contract was 500 ounces; I don't remember my next investments. I bought different amounts, 500 and 1000 and 1500, but the dates and the time I don't know. I don't recall the total amount of margins. I put up securities at different times, other securities and collateral. I would buy so much at a certain price and then either put up margins or put up stocks like Continental Baking or Anaconda or whatever I might have as a margin on it. I had 1500 ounces as of July 28, 1934; when I saw the market slipping I wanted immediate delivery and was willing to put up the entire amount. I talked with Mr. Walsh; he said there would probably be some arrangement made and advised me that if I put up the balance with the First National Bank of Seattle (it amounted to $535.00) that that silver would be delivered on the contract date, which was September—on or before September 30, 1934. I went down to the First National Bank and put up a check for $535.00 in the hands of the cashier. The letter (Plaintiff's Exhibit No. 64) was dictated by Mr. Walsh; he dictated it to his stenographer. He gave it to me and I took it down to the First National Bank in person to the cashier. [fol. 222] It relates to the 1500 ounces of silver and the $535.00 that I deposited there for delivery.

Objected to by Mr. McDonald as not binding on the defendant Lonergan, he not being present or any showing that he knew of it.

Objection overruled. Exception allowed.

(Plaintiff's Exhibit No. 64 received in evidence.)

I did not receive the delivery of the silver bullion—nor did I recover the two hundred dollars. The deposit of $535.00 in the First National Bank of Seattle is still there —not the same way—it is in a savings account. I left that deposit until after the delivery date of the contracts.

Cross-examination:

I am a druggist; 60 years old; the signature on Defendant's Exhibit A-2 is my signature. I read the card (signature card) at the time I signed it. I knew I was putting up margins and knew what margins meant. I had invested in other securities—the Arizona Comstock Mine; I was familiar with transactions of this kind. Mr. Walsh had been my banker at Port Orchard; I had known him for about twelve years; I knew that the market might go up or down; I took delivery of silver once; my transactions were with Mr. Walsh.

(Witness excused.)

Testimony of E. G. CHAMPREUX, called as a witness on behalf of the United States.

Direct examination:

[fol. 223] My name is Emil G. Champreux; I reside in Seattle; I had transactions in silver futures in 1933. I dealt and had these transactions with Louis Martin & Company; two salesmen of that concern, one by the name of Barnett and another by the name of Sternoff, sold me; Mr. Lonergan nor Mr. Walsh did not make any statements to me. I relied on the representations of the two salesmen, Sternoff and Barnett. I made my first investment in silver futures in February 1934; had put up one hundred and twenty dollars for 1000 ounces of silver; in February I bought June futures and then in June I sold them and kept my account up with Louis Martin & Company and then a few days subsequent to that I subscribed to another 1000 ounces of December futures; as of July 28, 1934 I had purchased a thousand ounces of December futures.

These papers (Plaintiff's Exhibit No. 65) I received in connection with the transactions I described from Louis Martin Company.

Mr. Hughes: At this time I offer in evidence what has been marked for identification as Government's Exhibit No. 65.

Mr. McDonald: Objected to upon the ground that there is nothing to show that Barnett and Sternoff had any connection with Lonergan or were authorized to make any statements on behalf of Lonergan and that Lonergan had any knowledge or information of this exhibit, and as to him it is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. McDonald: Exception.

The Court: Exception allowed. 65 is admitted.

(Plaintiff's Exhibit No. 65 is received in evidence.)

[fol. 224] Cross-examination:

The signature on the card (Defendant's Exhibit A-2) is my signature. The other signature, I believe, is Mr. Barnett's. My dealings were with Louis Martin Company.

(Witness excused.)

Testimony of JAMES D. HEADLEY, called as a witness on behalf of the United States.

Direct examination:

My name is James D. Headley; I live in Seattle; my occupation is a furniture dealer; in October 1933 I dealt in silver futures contracts through Norman Coles; he assured me as far as he personally was concerned that there was a sure proposition; he stated that each of these contracts represented silver bullion which was in storage and available. In other words, if I wanted to pay up on my contract at any time I could get the silver bullion. He laid much stress on the fact that the Seattle market was one of the five world markets; you could buy or sell twenty-four hours a day on one of these markets, depending on the time of day. He said the margin was put into some kind of a controlling fund that handled all the money of the exchange. I first gave him a check for fifty dollars, that was the margin required on a unit of 500 ounces; I purchased further contracts, probably three or four weeks after that; I took two more contracts. I put up one hun-

dred dollars at that time. I invested still further in silver futures contracts. Of course, some of these contracts were sold and re-purchased according to the months, all along, and accumulated a little profit. The items (Plaintiff's Exhibit No. 66) represent purchases and sales of different [fol. 225] *different* months silver contracts, also credit memorandums for money I paid in. I had conversations with Mr. Lonergan after my first investment. I conversed at different times about the silver market. I don't think he stated any use that was being made of the moneys deposited on the silver futures contracts, and he stated that if I would put up a certain amount of money that he would guarantee to earn me three per cent per month, but I never put any money up with Mr. Lonergan to obtain three per cent. About July 28, 1934, at the time of the break in the silver market, I had a conversation with Mr. Coles; I think it was along about Thursday or Friday that the market began to look suspicious; Mr. Coles called me up; he wanted to know what I wanted to do with my contracts—whether I wanted to protect them or not. I said, "No, I am not interested in putting up any more money on that." The next day or maybe Monday I went over to see Mr. Lonergan and asked him what I should do about it and he said, "Well, go ahead and protect your account." I took it to mean, put up more margin to protect my contracts. He was apparently pretty busy—didn't have much time to talk. That is about all that took place.

Cross-examination:

I have been engaged in business in Seattle about fourteen years. The signature on the card (witness indicates signature card) is my signature; the signature on the right is that of Mr. Coles; it was signed September 26, 1933. I didn't read the contract at that time; I knew what a margin was. I knew I was not buying any bullion by dealing in futures; I was familiar with the Chicago Grain Exchange and with commodity exchanges. It was not my intention [fol. 226] to accumulate silver bullion; I was speculating on the rise of silver; I was not very much impressed with the idea that I was going to get three per cent a month; nor I didn't believe that there was any commodity that could be bought that would be absolutely safe; I knew there was considerable speculation in silver at the time and that

the newspapers were giving prominence to the fact that the Administration contemplated artific-ally creating a demand for silver so that it would go to a price of $1.29. I wasn't much impressed with any representations that it was an absolutely sure-fire safe investment. I had known Mr. Coles ten or twelve years socially; I talked to Mr. Lonergan about selling him some office furniture for the exchange—did sell him some; at these meetings he was very enthusiastic about silver, he seemed a little bit obsessed with this silver idea; he told me that it was the biggest thing that came to Seattle since Jim Hill brought the Great Northern Railroad in here. I sold some furniture to the Seattle Metal Exchange; talked to Mr. Lonergan about it; made the suggestion that a new enterprise should have some ornate furniture in the exchange; Mr. Lonergan said that as far as the exchange was concerned, there would be nobody there but the members—wasn't a place where the public would come. There was no necessity for getting any ornate furniture. I also sold furniture to the Louis Martin Company.

I don't remember Mr. Lonergan discussing the article in the newspaper about Lonergan having 125,000 ounces of silver at the First National Bank, or that he had borrowed approximately $60,000 from John W. Eddy; I do remember him discussing that there was a certain amount of bullion [fol. 227] in the Trust Department of the bank.

Redirect examination:

He told me there was bullion on deposit in one of the banks and that it was available if I wanted to pay the balance up and get the bullion. I sold the exchange about $250.00 worth of furniture to furnish up the reception room, dealing with Mr. Lonergan. For the furniture sold to Louis Martin Company, I dealt with Mr. Walsh, Louis Martin Company paid me by check—by Mr. Walsh.

Recross-examination:

Mr. Lonergan was inclined to discuss the silver question at great length, if given an opportunity. I was acting on my own judgment to the extent that I was willing to gamble on the rise and fall of a regular silver market. At that time I sold furniture to Mr. Coles; he was a friend of a good many years close intimate friendship.

Redirect examination:

Mr. Coles paid for part of the furniture I sold to him; I took the furniture back on the balance due.

(Witness excused.)

Testimony of H. E. Wilson, called as a witness on behalf of the United States:

My name is H. E. Wilson; I reside at Port Orchard; I am a physician and have practiced in Port Orchard for 25 years; I have known Mr. Walsh for fifteen years, when he was a cashier in the bank in Port Orchard. I dealt in silver futures contracts in the summer of 1933. Mr. Walsh [fol. 228] had an account with me as physician for the family and when he went into the silver business he said that he would buy futures for me on that account. It was about a hundred dollars; he bought silver futures for me; a couple of days before he left as cashier of the bank he asked me to loan him four hundred dollars; I hesitated but finally wrote him out a check; he finally sent me a receipt that he had put it on futures.

Q. Now, Doctor, handing you what has been marked as Plaintiff's Exhibit No. 67, I will ask you to state what the first portion of that exhibit is, if you know?

A. $425.00.

Q. Where have you seen that before?

A. We sent that through the mail.

Q. By "he" you mean whom?

A. Mr. Walsh.

Q. I will ask you whether that covers the first $400.00 you let him handle?

A. With interest, $25.00 interest.

Mr. McDonald: I move that all this be stricken. It is entirely immaterial. Private loans between Dr. Wilson and Mr. Walsh have no bearing on this case.

The Court: I understand he is going to connect it up.

Mr. Hughes: We will connect it up with purchases in silver futures contracts.

The Court: Objection overruled.

Witness (continuing): After this initial loan to Mr. Walsh [fol. 229] of $400.00, I let Mr. Walsh have 1200 ounces of

silver which I had in storage and had bought from Mr. Lonergan. After this Walsh kept sending me commitments in silver futures contracts. The silver and the loan I let Mr. Walsh have, he put on margin; I didn't know about it until I got these receipts. He sent me commitments on the one hundred dollars on the physician's account right along. About two or three week- preceding July 28, 1934, I went over and asked him how much profits I had and he said $450.00; the next communication I had with him, he sent me a telegram demanding an additional margin; it was signed by P. A. Jordan & Company. I was on a trip to Alaska about July 28, 1934; I got back about August 1st. I had asked Mr. Walsh to close out my account; he didn't follow my instructions. I dealt with Mr. Walsh, who was with Louis Martin Company; I never dealt with Mr. George Goggins; I didn't know how my account happened to be with the P. A. Jordan Company; I called Mr. Walsh on the telephone and reprimanded him for sending me the telegram for additional margin. He said he sent it to everybody—there were no exceptions. I said I wasn't going to put up any additional margin.

Q. Did you ever recover any portion of the $800, or approximate sum of $800 that you had invested in silver futures contracts.

A. Yes.

Cross-examination:

I have been practicing medicine at Port Orchard for twenty-five years; I received a degree in the Physicians and Surgeons College, Baltimore; I speculated in grain a little at one time; I knew what margins were.

(Witness excused.)

Testimony of ARTHUR STERNOFF, called as a witness on behalf of the United States.

[fol. 230] Direct examination:

My name is Arthur Sternoff; I live at 708-26th Avenue (Seattle). At present I am a metal salesman; I am acquainted with Mr. Lonergan (witness identifies the defend-

ant); I saw Mr. Lonergan in the early part of 1933; he suggested I go to work for the Seattle Metal Exchange; there was a lot of money to be made selling silver. I had met Mr. Lonergan the previous year. I became connected with the exchange in January, 1934. I had three or four conversations with Mr. Lonergan through the year—once when I dropped up to the office. He told me Seattle was in a very strategic position in regard to the silver exchanges of the world; that we were geographically so located between New York on one side and Shanghai on the other that we would be able to deal with New York on our morning session of the exchange and Shanghai on the evening session, and would always be in touch with the world's markets. He said in the event of a crash in this market the other exchanges would step in and take up any surplus silver that could not be absorbed locally and that the market would then be brought up on an even keel with the rest of the markets of the world. On all other exchanges of the world an investor could not buy silver unless he bought in 25,000 ounce contracts, and the Seattle Silver Exchange offered the small man a chance to invest in the silver market; it was absolutely the safest investment in the world, and to bear out his statement he told me a story where silver had always been used as a medium of exchange along with gold, and that silver was the first medium of exchange known to mankind; the first time it was ever used was in the bible [fol. 231] and had been used from that day to this, and that in case of a crisis happening in any country the only real wealth one possessed was gold or silver. At that time Mr. Lonergan said that there was a probability of an advance in the price of silver due to the situation existing in regard to monetary matters, that there was not enough gold in the world to take care of the business that had to be conducted throughout the world, and they were bound to bring in some other metal to use as a medium of exchange, and the only other logical metal would be silver. Previous to any action on the part of the government, Mr. Lonergan persisted that the Government was bound to take some action in regard to the silver situation at that time; at the time I became connected with the exchange in January of 1934, it was just a few days after the United States entered into an agreement with all the countries of the world and which resulted in the London Silver Conference. I went to work for Louis Martin Company the first five or

six days of January 1934; my rate of compensation was eighty percent of the total brokerage fee on any contracts that I sold; the brokerage fee on each 500 ounces contract for buying and selling was $2.50, and the salesman received $2.00 of that amount and fifty cents was supposed to go to the brokerage house. I continued as a salesman for Louis Martin Company until July 27, 1934; there were various salesmen's meetings held in and around the offices of the Seattle Metal Exchange and the member brokers. I attended the meetings; Mr. Lonergan was present; at these meetings he stated that the margins or moneys were supposed to be put up in a clearing house of the Seattle [fol. 232] Metal Exchange. The clearing house handled all the money of the Seattle Metal Exchange and all money put up was supposed to go through the clearing house; the money was supposed to go against silver futures contracts; the clearing house acted as nothing more or less than an agent for the Seattle Metal Exchange and handled the money. Mr. Lonergan stated that if the customers had any doubt in their mind that delivery could not be made, to have the customer put up the rest of the margin in a bank and that at any time that the contracts became due that the silver would be delivered to the bank and the money would be collected out of the Seattle Metal Exchange. In making representations to my customers I relied on the statements of Mr. Lonergan and from a pamphlet called "The Silver Market," which was published by the Department of Commerce; also from different articles I read in magazines and also from a little research work I had done on silver in the Seattle public library; I relied mainly on Mr. Lonergan's instructions. I talked with Mr. Lonergan on July 27, 1934 when the market dropped three cents, which is the limit allowed by the rules of the Seattle Silver Exchange for any one day's drop. He explained that the drop was due to the fact that a group of our California investors had pooled their interests and offered them for sale on our market because they wanted to get out of the market, and that we did not have enough buyers to take up the amount that was being offered. He told me instead of talking to him to get out and try and get some other investors to take up the amount that was being offered. I asked Mr. Walsh the same question and he also told me [fol. 233] that California investors had offered their silver and it was not being absorbed. On Monday, July 28, 1934,

all the salesmen held a meeting in the Louis Martin Company offices; we tried to figure out what was happening and what was the cause of it, because the New York market and the Shanghai market and the London market had not dropped at all. Seattle, before the drop, was around a cent higher than the New York market, and after the first day's drop it was about two cents under the New York market. The first day the market broke the different brokers sent out different telegrams to all of their customers asking for additional fifteen cents. We figures out that the market looked like it was going to go down still further due to our customers being asked for more margin, so we got together and drew a resolution that the Exchange should be closed for a few days. We presented this resolution to Mr. Lonergan; he came down to our group a few minutes after being presented with this resolution and said, "Is that all you have to do is sit around here and write up resolutions? You are nothing but a bunch of fools. If you were smart you would get out and get investors to buy what is being offered on this exchange." On that Saturday I didn't do anything. Ray Thompson who was an associate broker of the Louis Martin Company at Tacoma and who was also present at that meeting, called Arthur Pritchard over; he was supposed to be one of the recognized silver authorities in the United States. Mr. Pritchard was at the meeting of the Louis Martin Company. On Monday, July 30th, the market opened up at the usual time and gradually started dropping; there was nothing [fol. 234] but asked prices; there were no bid prices. In other words, there were no buyers. When I saw Mr. Walsh on Monday, July 30th, he asked me to go out and see if I couldn't get some investors to take up the offerings which were being offered on the exchange. I did go out and I told Mr. Krupp of the situation. On the way back to the office I saw Mr. Lonergan; I told him I had a man who would be interested in buying 25,000 ounces of silver and did have the cash if we could show the warehouse receipt on the silver. Mr. Lonergan told me that if he had any doubt that we did not have the silver, all he would have to do was to put up the money in escrow. I told him Mr. Krupp was not interested in that; he wanted to see the warehouse receipt. Mr. Lonergan then told me to go and tell him to put the money up first. On Monday July 30th

Ray Thompson came over from Tacoma again; he and I went to see a friend of mine who is connected with the E. A. Pierce Company and told him the situation. I saw Mr. Lonergan on Tuesday morning. I asked him regarding the depositary of silver. He said he would have to check into it. I waited until about 9 o'clock and not having heard from them, Ray Thompson, who was with me at that time then came over here to this building and saw Mr. Dennis who was the United States District Attorney. We then went down to see Mr. Maslan, who was then at that time in the Prosecuting Office in the County-City Building, and then we went to the Exchange. I saw Mr. Lonergan after that in the office of Louis Martin Company. He told me that I had been causing them a little too much trouble and thought it best that I should sever my connections with the [fol. 235] firm. I told him I had already severed my connections with the first break in the market and that I was just handing around to try and protect my own clients. On August 10th I was in the office of Louis Martin Company; I sat down to write some letters to my different clients telling them what I had done and that I was no longer connected with the firm. Mr. Lonergan came in right after the close of the exchange, which was at 11:30, and when he saw me sitting there using the typewriter, he asked me, "Didn't I tell you to get out of here?" I said, "Yes, but I was just cleaning up some of my business." Then he went out of the door and immediately came back and demanded that I give him the letter I was writing, that the paper belonged to the Louis Martin Company and the typewriter did also, and I had no business being around there. He started for that letter, and I immediately tore the letter out of the typewriter and folded it up and put it in my pocket. He then told me to get out. I asked him, "Who are you to order me to get out of Louis Martin & Company's office, or is this just one of your many dummy firms, you tell them what to do?" He told me, "Yes, I am President of the Exchange, I control everything around here, and what I say goes."

Cross-examination:

I told Mr. Lonergan I was interested in silver, but as far as I was personally concerned I was not interested in the development end of an exchange; I was particularly

interested in the building up of some interest in the operations of foreign exchanges, and that I had studied the subject of silver extensively; he stated that the development of the Seattle Silver market would be the forerunner of the creation of a foreign exchange. I was primarily interested in working toward the future of that foreign exchange business; he told me that when I first became interested that it would require a number of years to build up an adequate silver supply here to create the basis for that foreign exchange business. He repeatedly during the period of time I was connected with the company assured me that the real [fol. 236] returns for those who were interested in the Seattle Silver market would come when they had achieved the position which would enable them to deal in foreign exchange transactions. When I first became associated with the silver market I was a salesman for the Louis Martin Company, and that was the only broker that I was ever employed by during the entire course of my business connection. The Seattle market was dealing with silver futures and occasionally operations in spot silver. I was familiar with the fact that the future delivery contracts for silver would require full performance of the terms if you wanted to get the silver on the future date. Mr. Lonergan explained the difference between the price of silver on the Seattle Market and the New York market; I understood that it cost money to remelt the standard bars for delivery in 500 ounce units in Seattle; that there were operating costs; cost of storing in vaults and of financing the holding of it; I understood these were the reasons for the difference in price between Seattle and New York; he explained, and I knew, that the silver to be delivered had to be shipped from San Francisco, New York, Shanghai or London. He explained repeatedly the idea that silver was supposed to be contracted for with the idea of accepting delivery when delivery date came. I don't know that there was posted in the office the resolution preventing any short selling on the market; there were so many people in that office you couldn't see anything. I understood that only members of the exchange were permitted to deal there and understood that the exchange provided for a three cent drop or [fol. 237] rise in any particular day. I read the pamphlet "The Seattle Silver Market" carefully. I remember reading that the official price was quoted in the New York Silver

Market in one-eighth cent fractions and there is usually about one-fourth cent below the market for nearby deliveries, and that the spread has on certain occasions been as much as six cents during the day after the official price has been established. I understood that the margin had to be either money or silver. I understood that the margin could be put up in the bank; the fall in prices was in the prices of future contracts. The quotations were in the September and December and March delivery months for future deliveries, and the silver future contracts were not due until the delivery month. Mr. Krupp was not willing to sign a customer's signature card. He was not willing to accept a contract subject to the rules and regulations of the exchange. I never knew of any salesmen of the Pierce Lonergan Company. Mr. Lonergan explained to me the operation whereby a customer could purchase silver in New York and hold it for delivery on future contracts in Seattle. It didn't necessarily have to be New York—it could be in any one of the markets and he could sell on the Seattle market at a higher price; he could ask a price and if he didn't get his price he didn't have to sell. His profit would be the difference between the two markets less the cost of carrying his contracts in the other market and carrying the silver for delivery here. I approached a number of prospective customers, more or less on the financing [fol. 238] deal, on buying spot silver and putting it up for sale on the futures market, and the difference in what he paid for it and for what he sold it would be his profit. I sold people with as small a profit as two or three percent, but that may be in a period of two or three months, maybe five percent; to make an answer to that question, 12 to 18 percent; I represented what they would make by selling certain future months. I told them they could even buy spot silver on the Seattle and sell on the futures market and make a profit; there is always a difference in the price because it costs money to carry the accounts. There always has been a profit to someone who bought on the spot market even in Seattle or elsewhere and sold on the futures market. That is not the same operation as for an individual to go in the market and to contract for the purchase of silver at a future date for future delivery on the customer's card—it is a different operation. As a salesman I had a number of customers who opened accounts with Louis Martin Com-

pany for the purpose of purchasing silver on futures contracts; they dealt subject to the rules of the exchange and to the provisions of the contract as recited in those rules and they were told that.

(Witness excused.)

Testimony of Robert Howard Hayes, Called as a Witness on Behalf of the United States

Robert Howard Hayes, the witness called in behalf of the Plaintiff, being first duly sworn, testified as follows:

My name is Robert Howard Hayes. I live in Seattle. I am manager of the King Coal Company. I know Mr. Pierce Lonergan. (Witness identifies defendant.) About [fol. 239] a week after the silver market crash, I heard the conversation between Mr. Lonergan and Mr. Sternoff. Mr. Lonergan came in and demanded of Mr. Sternoff what he was doing in there, that he was all through. Sternoff said, "Well, I am working for Louis Martin & Company, and what I am doing in here is no concern of yours." Mr. Lonergan's reply was to the effect that as President of the Seattle Silver Exchange, he had absolute control over what went on in any of those silver broker's offices; he said Sternoff was causing trouble down there; that the situation would work itself out, that Sternoff had no understanding of market manipulations, and that if he would leave things alone, Mr. Lonergan would work out everything to everybody's satisfaction.

I had about $360.00 invested in silver futures contracts, through Sternoff with the brokerage company of Louis Martin Company, for 3000 ounces. I recovered around $208.00.

Cross-examination:

The first purchases I made in February, 1934. I made other sales and purchases between that time and the time the market closed, so that my balance with Louis Martin & Company changed from time to time, depending on the market condition. My balance was substantially what I received back.

I received notice that I would have to put up additional security on my contracts about July 27th to 31st. I put

up the balance due on my contracts with the Seattle Trust Company, and they notified Louis Martin & Company that the money was available on the balance of the contracts.

Redirect examination:

[fol. 240] The $208.00 did not represent my balance after the drop of two cents a day for two or three days. The loss occurred from the first purchase of silver I made in February. As I recall it, those futures ran for three or four months, and at the time those futures became due and had to be taken up, my account was switched to another later date, and there had been a decline in the silver market during that period which caused my equity in there to shrink.

Recross-examination:

At the time of the conversation between Mr. Sternoff and Mr. Lonergan, I asked Mr. Lonergan what it was all about, and he told me I would either get my silver or my money. The silver, under the contracts I was holding, was not due to be delivered until September.

(Witness excused.)

Testimony of WILLIAM ARTHUR LINDMAN, Called as a Witness on Behalf of the United States

WILLIAM ARTHUR LINDMAN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

My name is William Arthur Lindman. I reside at 220 Olympic Place (Seattle).

My occupation is an automobile salesman.

In 1933-'34, I was a salesman, selling silver futures in Seattle Silver Market, connected with Louis Martin Company. Mr. Lonergan hired me. I talked with him first. He was the man I met there. I was under supervision in Louis Martin Company of Captain Coventry, the office manager, and working under John R. Walsh.

Mr. Lonergan explained the possibilities of silver, and that silver was treated as a commodity. He stated that people buying silver, provided that they had sufficient mar- [fol. 241] gin up, that there would always be little dips in the market, and not to go by any few days operation, but

over a period of time, the investment in silver would be absolutely safe.

The monies paid went into the clearing house of the Metal Exchange under the control of the members, the trustees of the clearing house,

In the negotiations leading up to my employment with Louis Martin Company, Mr. Lonergan stated that this exchange, like other exchanges, was limited to its drop of three cents a day, and that if our market got out of line with any of the other markets, the other markets would step in.

After I became employed with Louis Martin & Company, my duties were selling silver futures. In making statements and representations to customers, I was acting under the authority, directions and orders of Louis Martin & Company.

Questions were always brought up in our sales meetings, and they were answered by Mr. Lonergan.

Cross-examination:

Prior to my association with Louis Martin & Company, I had been a stock broker at one time; dealing in margins was explained to me, I did not understand it entirely, but I joined. I was familiar with the fact that the exchange was composed solely of those four member brokers, and couldn't deal with the public. Mr. Lonergan explained at the group meetings, the fact that the customers dealt directly with the brokers, and opened their accounts with the brokers, and the customers looked to the broker for the performance of their contracts. I explained that to my customers. Mr. Lonergan explained at the group meetings that all customers should [fol. 242] be advised not to speculate in the market, and that a person should be advised when their account was taken, and their orders placed, that they should be prepared to accept delivery when delivery was due on their contracts.

I was never employed directly by Mr. Lonergan to work for him as a broker. I had my choice to go to work for either one of the brokers that I wanted to. I understood there were two independent brokers, and I could choose which ever one I wanted to.

All my commissions were paid by Louis Martin & Company checks, as an employee of Louis Martin & Company.

We were advised at the meetings not to have our cus-

tomers speculate in dips and falls of the market, or what is known as trading in and out of the market. We were advised to contract on the basis of permanent investments in silver. I approached a customer by the name of Earl Diller, with a proposal of purchasing silver for the purpose of supplying the market when delivery dates were due. I knew that the Metal Exchange did want to have some one with sufficient money to buy silver to put it up, I understand, in one of the banks, to hold in escrow for the purpose of supplying the market. By so purchasing the silver, such an investment would stand to make the difference between the price that he paid for it, and the price it was sold on the futures market. I explained that arrangement substantially to Mr. Diller.

(Witness excused.)

Testimony of RAY THOMPSON, Called as a Witness on Behalf of the United States

RAY THOMPSON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

[fol. 243] Direct examination:

My name is Ray W. Thompson. I reside in Tacoma. My occupation is real estate.

I had transactions with the Seattle Metal Exchange during the latter part of 1934. I was representing the Louis Martin Company in Tacoma as an associate broker under the name of Ray Thompson Company. It was a corporation, incorporated for that purpose. Mr. Pritchard and myself owned the stock. We acted as brokers, that is, for the taking of orders, for the buying or selling of silver, and transmitting them to Louis Martin & Company, who executed them on the exchange. Our offices were maintained in Tacoma.

About July 27, 1934, I received a telegram from Louis Martin & Company calling upon me to put up about $5400.00 additional margins. This telegram (witness indicates telegram), is that telegram.

(Plaintiff's Exhibit No. 69 received in evidence.)

This telegram related to contracts with my customers and my own. It was under my name. I came over to Seattle

Saturday morning to a general meeting in Louis Martin & Company's office. That meeting resulted in the writing of a demand, a petition to the Governors of the Silver Market asking them to suspend the market for a period of three days. I have the original resolution. (Whereupon, the original was substituted for the copy, Plaintiff's Exhibit No. 9, and copy withdrawn.)

On Wednesday or Thursday, about the first of August, 1934, I had a conversation in Mr. Lonergan's office. I went into Mr. Lonergan's office and he said, "Now, you have been raising a lot of trouble outside here about the stock [fol. 244] market and I am going to explain to you what is taking place and what has to take place," and he said, "The silver market has to continue and it will continue and go down until the margins of your clients, investors, are wiped out, then the margins or assets of the broker; and until there is a deficit, if there is one, and then there will be a disposition made, a settlement, a private settlement for the deficit." And I said, "Why don't you stop the Exchange? There is no reason for this at all. The New York market is remaining just as it was. There is no reason for this silver dropping a nickel." And he said, "No, it can't be stopped."

I asked him why he did not have a New York broker in possession of the facts, and let him buy the silver. He said that it is too late to get a correspondent there, and establish the necessary channels. The market was bound to take that course. I said, "Well, as far as I am concerned, I have incorporated this business as a separate limited liability so that my liability will be limited to the Ray Thompson Company," but I said, "I think the market could be stopped to protect the clients." And he said, "Well there is no more reason to stop the market for the benefit of the clients than there is to carry on." I said, "Well, it is going to ruin the clients." "I can't help that," he said, "the silver market can't be stopped." I said, "Well, if it is between the market and the interests of the investors, I would be for stopping the market." That was about the substance of the interview.

He said that as long as there are offers of silver, and nobody to buy it, it is offered lower, and lower and lower, and it is continued to be offered lower, until somebody steps in and buys it. There were no buyers.

I couldn't be sure whether he stated to me at that time the statement that I had heard before that, that there were 200,000 ounces being offered. We had been told that on Saturday, by California interest, that, I was told, were clients of Goggin, and that that was the offering of silver which was breaking down the market." I never met Goggin [fol. 245] personally, but he was supposed to be one of the Trustees or Governors of the Exchange, and was supposed to be, as I understand, with P. A. Jordan & Company. My customers' margins were not wiped out. I had received notice that I would be held responsible for not only the margin, but any deficit caused by the drop in the market, to which I paid no attention.

Several days later, I think the following week, I came over and had a talk with Walsh, of Louis Martin & Company, and asked him what was to be done about it, and he said he did not know but what it was possible to make a compromise settlement, a private settlement, it may be called, or a private sale if it could be arranged. So I told him that in consideration of a payment to me of a sum of money which we were to arrive at, I would release to him the silver billion which at my request he had deposited in a Tacoma Bank.

At the time Mr. Pritchard and I decided that the silver market was a legitimate type of investment and that we were to represent it in Tacoma, I inquired of Mr. Lonergan and Mr. Walsh as to the modus operandi of the market, and was told that they had silver bullion actually bought and on deposit in Seattle against which the trading was handled. I asked Mr. Walsh if there was any objection that some of that could not be kept on deposit in Tacoma. He said "No, it would be quite alright." So we arranged to have that done and the silver to be put in the National Bank of Tacoma.

It was a written agreement, signed by Mr. Walsh and myself.

(Plaintiff's Exhibit No. 70 received in evidence.)

We released this silver to Mr. Walsh in accordance with our agreement to make a settlement for about $1,750.00 including Mr. Pritchard's interest and my own. I think it [fol. 246] covered roughly around 7,000 ounces.

(Plaintiff's Exhibit No. 71 received in evidence.)

I distributed this $1,710.00 in its entirety to the investors.

Cross-examination:

I am a graduate of Stanford and Columbia Universities, with the degree of A. B. at Stanford, and M. A. at Columbia. Economics was my major subject at Columbia.

I was in the advertising business five or six years in New York, and in the insurance business in 1932-33. In the insurance business, I was one of the highest salesmen in the number of policies written during the month for Penn Mutual. In the Fall of 1933, I came over here with Arthur Pritchard, and was introduced to Mr. Lonergan, and Mr. Walsh. I had known Mr. Pritchard since I was a boy. He is a business man in Tacoma, and I believe used to be Vice President of the Fidelity Trust Company. Mr. Pritchard was quite widely known as an authority on the silver question, and silver theories. He attended the United States Chamber of Commerce national conferance, and the International Chamber of Commerce conferance, in 1931, as a representative of the Northwest. He was a member of the silver delegation to the International Chamber of Commerce conferance.

He and I decided to go into the silver brokerage business in January, 1934. We organized a corporation, Mr. Pritchard, myself and Mr. W. Carr Morrow, of the firm of Grosscupt & Morrow, in Tacoma. Mr. Pritchard and I came to Seattle in order to meet Mr. Lonergan and Mr. Walsh, and Mr. Pritchard had been telling me about the silver [fol. 247] market, and thought that it was quite a valuable business enterprise. He told me that Mr. Lonergan enjoyed some little reputation as a silver expert, and that he had learned quite a bit of his information about the silver market from Mr. Lonergan.

In the course of the discussions, the advisability of establishing a silver market was based upon the further thought that there should be a foreign exchange or Oriental exchange bank established here in the Northwest, and it sounded quite feasible. We discussed seriously the question of whether that bank should be established in Tacoma or Seattle. Mr. Lonergan stated that we were all working towards getting silver reserves in here so we could continue further operations. Mr. Lonergan thought it was feasible and practical that individual private parties could accumulate that silver in lieu of the banks' accumulating it, and I cooperated to the extent of establishing a brokerage firm.

The idea was to break the silver down into small enough units so the average individual could acquire and store it, and in the aggregate accumulate a reserve here. I have seen both the 500 and 1200 ounce bars over in Tacoma. I tried to a considerable extent to interest the people of Tacoma in this program. I was not familiar with the mechanics and the operations of a commodity futures market. I had some general information from my previous education, and understood in a more or less particular way the operations of futures markets in grain, cotton, silk and others. I attempted to advise myself thoroughly with the mechanics and operations of the silver futures market in Seattle, and I had several copies of Defendant's Exhibit No. 1, Government bulletin, "The Silver Market". I had it for reference for any article or information on silver, was accumulated there anyway.

[fol. 248] I opened up a contract with Louis Martin Company for the purchase and sale of silver futures. My signature is on Defendant's Exhibit A-2. It is known as a customer's signature or agreement card.

The arrangement for the deposit of silver in Tacoma was to secure the faithful fulfillment of the contracts. And coincident with that I had on deposit with Martin Company certain cash, and other marginal deposits. This account was jointly controlled, and was to be released over the signatures of Mr. Walsh and myself.

It is a fact that I had asked Walsh for a credit report upon the Seattle Metal Exchange Clearing House Association. I asked him to give an account of the situation. That I was advised that the Clearing House Association was for the mutual protection of the members only is not a fact, that I know of. I was not advised that for protection the customer would have to look to his broker.

I received the letter, Defendant's Exhibit A-15, and also the enclosure.

(Defendant's Exhibit A-15 received in evidence.)

The purpose of the deposit of silver in Tacoma was not for the making delivery against contracts, unless there was some occasion to deliver silver against contracts. I did not present the resolution for the closing of the market to Mr. Lonergan. As far as I know, Mr. Coles and the Spokane man went up to see him. I was in Louis Martin Company's

office on July 27th. I was there Saturday, Monday, Tuesday and Wednesday, off and on at different times.

I saw Mr. Lonergan around Wednesday, after I had seen Mr. Dennis, and after I had gone with Mr. Sternoff to see Mr. Maslan, and had seen what action I could take to stop [fol. 249] the market because he called me in. I wanted any kind of proceedings to stop that market.

Q. By what experience or what knowledge did you think that was criminal action?

A. I felt there was no occasion whatsoever for this juggling that was going on in the market.

Q. You felt that, but you admit you had no experience or knowledge in such matters?

A. It didn't take more than 24 hours to see that the absurd statement that there was silver of 200,000 ounces being offered at less than cost was a palpable lie in my opinion.

Q. It was a palpable lie?

A. Yes.

Q. Because it was offered at less than cost?

A. I believed that on Saturday. By the following Mondal, I didn't.

Q. Just a minute: You say that is a palpable lie because that silver was being offered at less than cost. If that was wrong, why wasn't there some bids for it?

A. That is what I couldn't see, because there was no such offering, and no such actual people in existence. They could have sole their silver, the 200,000 ounces on the New York market for the full price.

—. If no buyer and seller met you had no market. To the question, "Then how could you determine what the market or cost price of that thing would be?"

A. I am giving the answer. You asked me how and I will try and explain it to you. If silver has been purchased at some unknown figure, theoretically more or less the same as the market quotations have been over a series of months or years, and it is subsequently offered at a much lower figure for sale, it is obvious that if there has been a real purchase, they are going to lose money on the sale. I came to the conclusion that this continued offering of 200,000 ounces, or whatever it was, of distressed silver so-called was not real because it was being continuously offered down

lower and lower, and the net result was merely to break the market here.

[fol. 250] I know that under the edict of the President all silver futures in all silver markets in the United States were closed.

The minimum unit of trade in Seattle was 500 ounces on one contract, and a person could buy one contract or any multiple of one contract. No matter what amount of silver was on the market, it was in bids or offers of 500 ounces. There were no bids for 500 ounces, presumably because the market shows no transactions. I made no bids, and none of my wealthy customers, because we got the telegram demanding margins for apparently no reason at all, and everybody became suspicious and naturally didn't want to buy. There was no substantial buying after June 19, 1934. Practically all my accounts had been committed prior to June 19th.

We had been told here that the pride here would approximately be the price in New York, plus the cost of transportation, handling the business, and the brokerage. I am unable to say what effect the 50 per cent profit tax had upon the market value of those contracts already committed on that market. I did not know what effect the Silver Purchase Act would have at the time we passed the resolution.

As I remember, the average price of the Seattle market was about two or three cents higher than the New York market. If we worked on a basis of a cost of three cents, then with the 50 per cent profit tax, the spread would have to be six cents. I presume it would be reasonable to suppose that to buy silver in odd lots in Seattle and to sell it, would cost three cents, if it costs three cents to buy silver in New York, and sell it in Seattle.

The papers said that the Government treasury was buying in New York and supporting that market. The profit tax did not apply to sales made to the Government.

Q. Now is there any distortion in saying that when there was a purchase in Seattle as against the sale to a private [fol. 251] individual in New York, there would be a six cents spread?

A. I don't see why the spread would be any different because the profit tax would be the same in both places for the individual purchase, isn't that right?

Q. You are testifying.
A. All right. That is right.

There were no sales or purchases made here to the United States Government to my knowledge. I recognize a distinct difference in the market conditions in which there were sales made to the Government in New York, and where there were no sales made to the Government in Seattle.

It appears from Plaintiff's Exhibit No. 8, referring to the last two pages of the Exhibit, referring to the first day of August, it shows that the bid 46.9 per ounce in New York, as against the Seattle price of 42.3, or a difference of some four and a fraction cents. It was explained that the clearing house was where the member brokers of the exchange cleared their buying and selling contracts with one another, and that it operated under the same manner as the clearing house of other futures commodity markets, including grain, silk, rubber, etc. The basis principle was typified in the bank clearing house association.

It was explained that in the delivery months, the selling broker would tender through the clearing house the contracts for delivery to the buying broker. The buying broker would, in turn, notify the customer that he had some seventy-two hours to indicate whether he would take delivery, or close out his contract.

No silver was tendered on my contracts, because when a month came due, they bought a month in the futures, instead, transferred one month to another. When we opened our office in Tacoma, I had some margin contracts. When March came around, I did not take the silver. I sold [fol. 252] it, and bought a future month. When June came around, I did the same for June contracts. I did this sometimes in the delivery month, and sometimes prior. I did not wait to have the silver tendered to me, nor for my contracts to mature at one time, but disposed of them at regular intervals.

The fifty per cent profit tax under the Purchase Act in a series of such transactions would cause the marketability of such contracts to disappear in its entirety. If it were determined that the marketability of customer's contracts were materially affected, and my customers put up the margins which were required from time to time, and Mr. Bilberg's customers in Spokane failed to put up margins

and defaulted, it would materially impair their standing, and the Louis Martin Company would have to be ruled off the Exchange.

I would say that the failure of the corresponding brokers of Louis Martin Company, Bilberg in Spokane, Norman Edwards Company, in Seattle, and other customers of Martin & Company, to put up their margins, and Martin & company being under obligation with other brokers to buy, that that would cause the insolvency of Louis Martin Company.

In order to determine their liability and the rights of those who kept their margins up, with respect to their contracts, would be to keep the market open.

My customers would only have what Louis Martin Company had on deposit as margins, plus their assets if other customers and associate brokers failed to keep their margins up. Mr. Lonergan told me that the best support we would get would be in offering that 25,000 ounces or any part thereof for sale or purchase. The purpose of offering [fol. 253] it in large sums was to induce support from the New York market in the manner that had previously been explained, and thereby any bid here or anywhere else could buy in this market and hedge or sell in New York. In order to do that, it would be necessary to have at least 25,000 ounces to correspond to the New York requirements. The Government could, while it was buying that silver in New York, also have bought on the Seattle market. This was an open market. The Government could buy cheaper, here, certainly.

Mr. Pritchard and I wired to the Secretary of the Treasury, asking him to do something about this market. I think it was July 30th, or 31st. We didn't get any bids from the Treasury. The New York market closed up on August 9th, when the nationalization of silver was proclaimed. They froze it at a given figure. That proclamation confiscated all silver in the country not under contract. That made it impossible to perform the contracts which were in the Seattle market. All that was to be done was to make some sort of settlement with those people who had attempted to keep their contracts up.

The margin calls that were sent out on July 27th, with the previous six cents an ounce, would make the margins about twenty-one or twenty-two cents, which would consti-

tute just 50% of the value of the contracts. We had been informed that under the future contracts the broker had a right to call for more margin. It was to be determined at the broker's discretion, as to whether or not his account was in danger. It did not necessarily take any fall in the market for the broker to exercise that broker's right. The market might have stayed at the same place, and the broker had a right to call for fifteen cents an ounce. The offering [fol. 254] of these contracts upon the market would determine what the market value was, if there was a market, and where the buyer and seller met; that would be the basis of making a settlement of the contracts of the brokers and the customers. If that offer had not been met, and those demands to liquidate the contracts had not been made, there would be no basis upon which you could determine the liabilities and the responsibilities of the different customers. I should think that would be the basis they were supposed to be determined on.

Redirect examination:

My understanding is, that suppose there was a spread of three cents between Seattle and New York, representing the cost of transportation and doing business, if there was an arbitrary tax amounting to three cents, we could take that as a figure representing 50% of it if there is a profit. Don't forget that there has to be a profit. That profit tax would apply equally on the transactions of the New York market as on the transactions of the Seattle market. Therefore, the level would still remain only three cents apart, as far as I can see.

Recross-examination:

I don't know how the profit tax directly affected the Shanghai market. I believe it did close. They had to go off the silver standard. Handy & Harman, after sixty years of experience in this country, were compelled to suspend their quotations, because there was no silver market in the United States.

(Witness excused.)

Testimony of L. C. McCaslin, Called as a Witness on Behalf of the United States

L. C. McCaslin, called as a witness on behalf of the plain-
[fol. 255] tiff, being first duly sworn, testifies as follows:

My name is Louis C. McCaslin. I reside in Port Orchard. I am agent of the Puget Sound Navigation Company. I am acquainted with Mr. Walsh, and had dealings with him in buying silver on the silver market. I think the first transaction was in the early part of 1933. I bought a bar of silver through Mr. Walsh and Mr. Lonergan. I paid approximately $400.00. The weight was about 1200 ounces. (Witness identifies defendant.) I eventually sold the bar of silver and bought futures, acting on request of Mr. Walsh. I think I sold it for thirty-eight cents an ounce, and then invested about $600.00 in silver futures. I had about $400.00 in the first place. Plaintiff's Exhibit 72 are buy and sell orders relating to the buying and selling of silver futures on behalf of myself and Jack Walsh.

(Plaintiff's Exhibit No. 72 received in evidence.)

Plaintiff's Exhibit 73 is a letter from Jack Walsh. I received it through the mail at Port Orchard. The second portion is the envelope the letter came in.

The Court: Is it the envelope the letter came in to you?

The Witness: Yes.

By Mr. Hughes:

Q. You took the letter out of the envelope?

A. Yes.

Q. In whose possession has this been since your receipt of it?

A. In Mr. Swenson's.

Q. You turned it over to Mr. Swenson?

A. Yes, sir.

Mr. Hughes: I am going to offer in evidence Plaintiff's
[fol. 256] Exhibit No. 73, and I would further direct the Court's attention to the fact that Count 2 of the indictment is predicated on this particular exhibit.

Mr. McDonald: There is no sufficient identification—the mere fact that a man gets a letter, there is no proof sufficient to connect this defendant with it.

Mr. Hughes: I might ask one further question.

Q. Are you acquainted with the signature of Mr. John R. Walsh?

A. Yes, sir, I am.

Q. I will ask you to state whether that exhibit is signed by John R. Walsh?

A. It looks like John R. Walsh's signature; I have seen it many times at the bank.

The Court: Ask him what it relates to?

Q. That relates to what, this letter?

A. It relates—I sold silver at this time and this relates to their failing to mail me a check immediately and their mailin- the check here.

Q. It relates to your dealings in silver contracts with what company?

A. Seattle Metal Exchange.

Mr. Hughes: I renew the offer, if the Court please.

Mr. McDonald: The same objection.

The Court: Objection overruled; 73 is admitted.

Mr. McDonald: Exception.

The Court: Exception allowed.

(Plaintiff's Exhibit No. 73 received in evidence.)

Witness (continuing): When Mr. Walsh sold me the [fol. 257] silver, he said we would have to have an eight cent margin, and when I got there (Seattle) next day, he said I would have to sell two of my contracts. That amounted to something over $200.00. I sold two of the contracts in silver for something over $200.00 to cover that.

It was the day after that telegram was dated.

Cross-examination:

I have known Mr. Walsh for about twelve years, and knew him in the bank. I bought the silver through Mr. Lonergan in the early part of 1933.

I made arrangements through the Pacific National Bank.

I am making no complaint about the bar of silver. My transaction in regard to future contracts was with Mr. Walsh. Several of these transactions were Mr. Walsh's own. He did it himself without my telling him to do so. He sent me the statement, and I did not make any complaint.

My original transaction called for delivery in March. I did not take it, and I did not ask for it.

I wrote Mr. Walsh and told him I did not want to take the silver. I was speculating—yes.

I am thirty-five years old. I knew it was a certain amount of speculation, but I had known the man for twelve years. He told me it was a world market, and that if there was any danger whatsoever he would take care of his Port Angeles people.

[fol. 258] I anticipated possibly I might lose something.

I knew it was not sure, but having what I thought was his protection, I thought it was safe enough.

(Defendant's Exhibit No. A-16 received in evidence.)

In the letter, Defendant's A-16, Mr. Walsh told me that it was impossible to say what was going to happen.

I did not take my silver, which I could have done, but directed him to turn the contracts in and take a chance.

The signature on the defendant's Exhibit A-2 (witness indicates signature card), is my signature. I see Mr. Walsh's signature there.

I knew at the time I signed that card that in the event Mr. Walsh wanted more security that I would be required to put up the security, or else be sold out.

(Witness excused.)

[fol. 259] Testimony of A. M. Atwood, called as a witness on behalf of the United States.

Direct examination:

My name is A. M. Atwood; I am Vice President of John Davis & Company (Seattle); I am acquainted with Mr. Lonergan. These transactions cover a period of about a year and a half prior to the first of August 1934. I received a letter personally from Mr. Lonergan; he had talked to me many times about silver; I ran into Lonergan, rather he ran into me; he said he did not think there was any question but what silver would go to a dollar an ounce; then it was thirty-five cents. I made further purchases of silver futures on silver contracts. My dealings were with Captain Coventry; they were handled through Louis Martin Company; the original purchase was from Louis Martin Company; in the first place it was sent to me—not solicited by Pierce Lonergan. Soon after the break started I was sent a tele-

gram by Western Union demanding that I put up four hundred dollars more margin; I was told by Mr. Lonergan about July 27, 1934 that the drop in the price of silver in the Seattle market was caused through a pool of Tacoma investors unloading 200,000 ounces on the local market and the market could not absorb it. He said there was a law suit pending of $150,000 against the Louis Martin Company, and in the event that they came in and garnisheed the bank account we could not move at all. I deposited additional margin with the First National Bank of Seattle; the bank issued a letter to Louis Martin Company stating the four hundred dollars was in their possession to take [fol. 260] care of my account. It did not represent the balance due on my contracts—it was the extra margin required of the drop in the market. I went up to Louis Martin Company offices; I ran into Mr. Lonergan in the hall on the second floor from the offices of the Louis Martin Company, and asked him if it would not be possible for him to fix this thing up. He said, "No, you got to see Walsh." The next morning, I think it was Wednesday, I got a call from Walsh. I told him of the conversation I had with Mr. Lonergan; he said "All right, you come back in twenty minutes and I will have it fixed up for you." I did come back; he had a check for $17.74, which represented the amount of money I would get out of my investings with the Martin Company, excepting the four hundred dollars I deposited in the First National Bank; he also gave me a release of the First National Bank money so that I could go down there with that release and get that money. So I got the $417.74.

Q. Handing you what has been marked for identification as Plaintiff's Exhibit No. 75, I will ask you to state what that is, if you know, without going into the contents?

A. That is a letter from my attorney, Joseph Gandy, addressed to Pierce Lonergan & Company.

Q. Where have you seen that before?

A. I saw the letter before it had been out of Mr. Gandy's office.

Q. That is a copy?

A. That is a copy.

Mr. Hughes: I will identify this further later on before I offer it.

[fol. 261] The Court: What subject does it relate to?

Q. What subject does it relate to, Mr. Atwood?

A. It relates to my transactions with Mr. Lonergan and the Louis Martin Company.

Q. Handing you what has been marked for identification as Plaintiff's Exhibit No. 76, I will ask you what that exhibit consists of?

A. This is a letter from the Louis Martin Company in reply to a letter from my attorney, Mr. Gandy.

Q. And is addressed to whom?

A. Addressed to Battle, Hulbert, Helsell & Bettens, in whose office Mr. Gandy is located; he is associated with them, and this letter—I will read it, if you wish.

Q. Don't go into the contents. Where have you seen that letter before?

A. Mr. Gandy showed it to me after he received it.

Q. Then if you will look at the second portion of that exhibit, state what that is, if you know?

A. This is a letter dated August 21st from the Louis Martin Company signed by J. R. Walsh.

Q. Addressed to whom?

A. Addressed to A. M. Atwood, care of John Davis & Company, Seattle.

Q. Where have you seen that letter before?

A. That letter came to me personally.

Q. You received it how?

A. Through the mail.

Q. It relates to what subject matter?

A. It is a reply to the letter from me of the 19th of August.

[fol. 262] Q. And refers to what?

A. The silver contracts and my transactions with the Louis Martin Company.

(Witness excused to permit the calling out of order of the witness Joseph Gandey.)

Cross-examination.

The signature on the card extracted from the defendant's exhibit A-2 is my signature (witness identifies signature card).

(Witness excused.)

Testimony of JOSEPH GANDY, called as a witness on behalf of the United States.

Direct examination:

My name is Joseph Gandy; I am an attorney, connected with the firm of Battle, Hulbert, Helsell & Bettens, with offices in the Exchange Building in Seattle.

Q. Now, Mr. Gandy, handing you what has been marked for identification as Plaintiff's Exhibit 75, I will ask you to state what that is, if you know?

A. That is a carbon copy of a letter that I wrote under date of August 17th, 1934.

Q. Addressed to whom?

A. Addressed to Mr. Pierce Lonergan.

Q. Refers to what general subject matter?

A. It refers to the relations and dealings between Mr. A. M. Atwood and the Louis Martin Company and the Seattle Metal Exchange.

Q. What was your relationship with Mr. Atwood?

[fol. 263] A. I was his attorney.

Q. That was transmitted how?

A. I transmitted this and a copy of the Louis Martin Company under registered mail return receipt requested.

Q. Have you that return receipt?

A. Yes, I have.

Q. Will you produce that?

A. This is the return receipt of the Pierce Lonergan letter and this is the one from Louis Martin Company letter; there are the payments for it.

Mr. Hughes: If the Court please, I am going to attach the return receipts to that exhibit.

The Court: Respectively.

Q. That letter was written at the request of whom?

A. Mr. Atwood.

Mr. Hughes: With that, if the Court please, I offer into evidence what has been marked for identification as Plaintiff's Exhibit No. 75.

Mr. Luckerath: Has Your Honor inspected the return receipts here?

The Court: No; let me see those.

Mr. Luckerath: I direct the Court's attention to the fact that neither one of them shows the defendant Lonergan's

signature; in fact addressed to the Louis Martin Company and received by officers of the Louis Martin Company; obviously the same lack of identification exists now as before. It is also objectionable for the reasons that we are not interested in attorney's opinions about transactions or their conclusions or anything else. It is pure conclusions of third parties and happened subsequently and shouldn't be admitted.

[fol. 264] Mr. Hughes: Nothing further, if the Court please.

The Court: The objection is sustained.

Mr. Hughes: The grounds for the ruling of the Court:

The Court: The additional one that it is a self-serving statement of an interested party after the event directed to the other person; in addition to those reasons as stated by counsel making the objection.

Mr. Hughes: If the Court please, we are not going to withdraw that; we will have further testimony by way of identification and showing the pertinency of that exhibit.

Q. Mr. Gandy, handing you what has been marked for identification as Plaintiff's Exhibit No. 76, I will ask you to state what the first portion of that exhibit is?

A. The first portion?

Q. Yes.

A. That is the response that I received from the Louis Martin Company in response to my letter of August 17th, 1934.

Q. And you received that how? It was transmitted to you how?

A. By United States mail.

Q. And received by yourself personally?

A. Received by myself personally and by my stenographer who handed it to me.

Mr. Hughes: If the Court please, I offer into evidence what has been marked for identification as Plaintiff's Exhibit No. 76.

Mr. Luckerath: You didn't receive the second part of this exhibit did you?

The Witness: No, I did not.

[fol. 265] Mr. Luckerath: It is not proper to introduce the exhibit in parts that way.

Mr. Hughes: I am simply trying to cut down the number of exhibits in this case. The second portion of this exhibit

has been identified by Mr. Atwood as being received by himself through the mails on the date stated here. He stated it was in his continuous possession from the time until he turned it over to Mr. Swenson. I submit, if the Court please, that is proper identification.

Mr. Luckerath: These should be segregated.

The Court: Very well; it may be segregated.

Mr. Hughes: Mark it "A" and "B".

The Court: 76-A and 76-B.

Mr. Luckerath: Object to 76-A for the reason that it is not part of the res gestae in this case, that it is referring to a past transaction and has no connection with the defendant Lonergan as shown thus far, and so far it has been insufficiently identified.

Mr. Hughes: If the Court please, in considering the admissibility of this exhibit, it might be well to bear in mind the time stated in the indictment, which is down to the 27th day of August; the 9th Count is based on a letter sent at that time. These letters of which these consist, are all mailed and dated prior to that.

Mr. Luckerath: It is not, however, part of the res gestae alleged in the indictment, of course.

The Court: Now, then, the objection as to 76-A is overruled and an exception allowed, and 76-A is now admitted.

[fol. 266] Mr. Hughes: If the Court please, I move for leave of the Court to read this exhibit.

The Court: 76-A.

Mr. Hughes: Yes, if the Court please.

(Whereupon Mr. Hughes read aloud to the jury Plaintiff's Exhibit 76-A.)

Mr. Hughes: I move at this time for leave of the Court to read Exhibit 76-B.

The Court: It is not offered yet.

Mr. Hughes: Well, at this time, then, if the Court please, I offer what has been marked for identification as Plaintiff's Exhibit 76-B.

Mr. Luckerath: Objected to on the ground that it has not been properly identified and no foundation laid, doesn't connect the defendant with any transaction, nothing to show he had any knowledge of it, and it relates to past events.

The Court: The objections are overruled, exception allowed; 76-B is admitted.

Mr. Luckerath: May I make this further request: There appears to be a pencil notation at the bottom of this letter which I think should be deleted.

The Court: Call it to counsel's attention.

Mr. Hughes: I don't intend to read it.

Mr. Luckerath: Well, erase it. I presume it is going into evidence.

Mr. Hughes: I ask leave of the Court to read Plaintiff's Exhibit 76-B.

[fol. 267] The Court: You may do so.

(Whereupon Mr. Hughes read aloud to the jury Plaintiff's Exhibit 76-B.)

Mr. Hughes: If the Court please, without further offer of proof by way of identifying this Exhibit No. 75, I re-offer it at this time, what has been marked for identification as Plaintiff's Exhibit No. 75.

Mr. Luckerath. I renew my objection as stated before, if Your Honor please.

The Court: In view of the fact that these two letters, exhibits, have been admitted, 76-A and 76-B having been admitted, it seems to me that the whole portion of that phase of the transaction should be in, if any part of it.

Mr. Luckerath: But, Your Honor, these are purely statements of third parties, and are self-serving.

The Court: 75 is responded to by one of the others—76-A or 76-B; for that reason which did not exist before, the objection is overruled, exception allowed, and 75 is now admitted.

Mr. Luckerath: Exception.

Mr. Hughes: I ask leave of the Court to read No. 75.

The Court: You may do so.

(Whereupon Mr. Hughes read aloud to the jury Plaintiff's Exhibit No. 75.)

Mr. Luckerath: Now, if Your Honor please, I am now going to request that Your Honor strike the exhibit from the record and instruct the jury to disregard it on the fur-
[fol. 268] ther ground that observation of these letters indicates that the replies referred to in 76-A and B pertains to a letter written August 19th and the letter read to the jury was not the one replied to as having been written on the 17th of August, apparently another one subsequently

mailed, and as I see by these—I am not sure—yes, I see here apparently they sent two letters and one is dated 19th and one 17th, received on following days, so counsel has apparently been mislead in thinking that that is the letter that was replied to.

Mr. Hughes: This is the letter; that is the first portion of Plaintiff's Exhibit 76-A which was in answer to the letter I just read.

Mr. Luckerath: On the face of it that is a conclusion. It states on its face that it is a reply——

The Witness: The letter of August 17th, 1934, in the only letter addressed at any time to Mr. Lonergan or the Louis Martin Company.

Mr. Luckerath: You are referring now to 76-A?

Mr. Hughes: You are referring to which?

The Witness: I am referring to 75; that is the only letter that I have ever written to either Mr. Lonergan or the Louis Martin Company and 76-A is the only response I ever received from either one of them.

The Court: The Court is sufficiently advised and the motion is denied.

Mr. Luckerath: I renew that objection, if Your Honor please and move the testimony be stricken on those grounds.

The Court: Motion denied, exception allowed.

Mr. Luckerath: Exception.

Mr. Hughes: That is all.

Mr. Luckerath: No examination.

(Witness excused.)

[fol. 269] Testimony of George Welch, called as a witness on behalf of the United States.

Direct examination:

My name is George Welch; I reside in Port Townsend; my occupation is insurance and investments; I had no transactions with Mr. Lonergan; I dealt only through members of the Seattle Metal Exchange—I think it was April 1934. I had no agreement in particular with Mr. Lonergan in respect to silver futures contracts; he was telling me it was a good investment; he said they were handled by the Seattle Metal Exchange and I could buy them through the members.

He recommended that I sell silver futures contracts; I bought some myself through the Louis Martin Company.

(Plaintiff's Exhibit No. 77 received in evidence.)

I think I invested in futures contracts in two lots of 500 ounces—a total margin of $120.00.

Cross-examination.

I have acted as broker on repeated occasions on securities; my contacts with Mr. Lonergan were substantially to the end that I would become interested in opening a corresponding broker's office in Port Townsend with some member broker of the Seattle Metal Exchange; I did associate myself with the Louis Martin Company; arrangements were made by correspondence. I was an investing broker; I am familiar with the fact that there are some dealers and brokers known as dealers; they deal directly with brokers and not with customers. The only occasion on which I saw Mr. Lonergan was probably in January in Port Townsend; he came to make a talk to one of our civic groups; he ex-[fol. 270] plained the background of silver and eulogized it as a safe and proper investment.

Defendant's Exhibit A-18 is a formal application to me to become an associate broker; that is my signature on the bottom; it was sent to Louis Martin Company.

(Defendant's Exhibit No. A-18 received in evidence.)

(Witness excused.)

Testimony of AXEL K. ENGQUIST, called as a Witness on behalf of the United States.

Direct examination:

My name is Axel K. Engquist; I live in Poulsbo, or near Poulsbo, Washington; my occupation is fishing—purse seining fishing; I have been in the business thirty-two years. I had occasion to deal in silver futures transactions during 1933 with Mr. Coles. About December 1933 I loaned Mr. Lonergan $425.00; he borrowed the money; I was to receive three percent interest; during December he also borrowed the amount of $6000; I got the interest sent home. That is all I borrowed then; I received the interest. Mr. Coles got

me to switch over to silver futures; I think I purchased 45,000 ounces. In March 1934 I had $8723.00 including $1620.00, which was invested on behalf of my sons. Plaintiff's Exhibit No. 78 is the receipts I got for the money to Louis Martin Company.

(Plaintiff's Exhibit No. 78 received in evidence.)

Plaintiff's Exhibit No. 79 is receipts I got for silver that was bought and sold; I received them from Louis Martin Company.

(Plaintiff's Exhibit No. 79 received in evidence.)

By Mr. Hughes:

Q. Mr. Engquist, handing you what has been marked for identification as Plaintiff's Exhibit No. 80, I ask you to state [fol. 271] what that is, if you know. Have you ever seen that before?

A. Yes, I had that.

Q. Where did you receive that, or where did you see it?

A. From the same place, from Louis Martin & Company.

Q. With reference to what, what is the nature of it?

A. This here $1620.00 is my sons' money.

Q. Does that have relation to silver future contracts?

A. Yes.

Q. And how did you receive that?

A. Through the mail.

Q. And what did you do with that letter, where has it been since you received it through the mail?

A. I told you I had that up until I turned it over to Mr. Swenson.

Mr. Hughes: I offer into evidence now what has been marked for identification as Plaintiff's Exhibit No. 80.

Mr. McDonald: Objected to, Your Honor, no foundation laid to show that Lonergan ever authorized Coles. It is a letter by Mr. Coles.

The Court: The objection is overruled. Plaintiff's Exhibit No. 80 is admitted.

Mr. McDonald: Exception.

The Court: Exception allowed.

(Letter received in evidence as Plaintiff's Exhibit No. 80.)

Mr. Hughes: At this time I ask for leave of Court to read this exhibit.

The Court: You may do so.

(Mr. Hughes reads Plaintiff's Exhibit No. 80.)

[fol. 272] By Mr. Hughes:

Q. Mr. Engquist, handing you what has been marked for identification as Plaintiff's Exhibit No. 81, I will ask you to state—you can just examine it, just look through that and state what it is?

A. Those were our contracts that were sold, that is, when the time was——

Q. And you received that from whom, those letters, from whom?

A. Louis Martin Company.

Q. And you received them, they were transmitted to you how?

A. By mail.

Q. They relate to what?

A. To silver futures.

Q. And they have been in whose possession since that time?

A. Mr. Swenson's.

Q. And you turned them over to Mr. Swenson?

A. Yes.

Mr. McDonald: I object to this exhibit, Your Honor, on the ground that it relates only to transactions with Norman Edward Company, which is in no way charged as a principal in this indictment, or a party, or any relation between them and Lonergan, this defendant on trial, and therefore being incompetent to be received against him.

The Court: Objection overruled. Exception allowed. Plaintiffs Exhibit No. 81 is admitted.

(Plaintiff's Exhibit No. 81 received in evidence.)

Mr. Hughes: And if the Court please, I ask the Court's leave to read a portion of this exhibit.

The Court: You may do so.

(Mr. Hughes reads the letter of August 2, 1934, in Plaintiff's Exhibit No. 81.)

[fol. 273] Cross-examination:

That is my signature on Defendant's Exhibit A-9 (signature card); the name on it is Norman Edward Company and Norman E. Cole's signature, December 7, 1933. I had known Mr. Coles since 1931; he was my stock broker, buying stocks and bonds in the market. Mr. Coles told me I would make more money if I put it in silver futures contracts; I did it on the advice of Mr. Coles. I authorized the transfer of this money to Louis Martin Company. Defendant's Exhibit A-19 is my own handwriting.

(Defendant's Exhibit A-19 received in evidence.)

The note made out to me by Mr. Lonergan was for six months; the loan was only about a month and the money was transferred. I made arrangements with Coles to drop the note business and put the money into the buying of silver futures. I turned the note back to Mr. Lonergan when I dropped the arrangement. Coles was the man I talked with. The only transaction I had with Lonergan was later straightened up.

Mr. Hughes: I offer that (Plaintiff's Exhibit No. 82), if your Honor please.

By Mr. McDonald: Mr. Engquist, calling your attention to Government's Exhibit No. 82 for identification only, you told Mr. Hughes that that was an order directed to Louis Martin & Company. I ask you to read it and see if you are not mistaken, and that it was to Norman Edward Company.

A. Yes, I see that now.

Mr. McDonald: Now, if the Court please, I object to the [fol. 274] introduction of this evidence on the ground that it is a transaction with an independent broker, and one not a member of the Exchange, in no way under the direction and control, or in any way connected, with Lonergan, and therefore it is to him "Res Inter Alios Acta".

The Court: That independent broker's name? Name the independent broker you have in mind.

Mr. McDonald: Norman Edward Company.

The Court: The objection is overruled.

Mr. McDonald: Exception.

The Court: Exception allowed.

Mr. Hughes: I might also state that this $3000.00 letter——

Mr. McDonald (interposing): Now, if the Court please, I object to counsel testifying.

(Discussion.)

(Plaintiff's Exhibit No. 82 received in evidence.)

(Witness excused.)

Testimony of Louis J. Gill, called as a witness on behalf of the United States.

Direct examination:

My name is Louis J. Gill; at the present time I reside in Spokane; part of 1931, 1932 and 1933 I resided in Seattle. I have known Mr. Lonergan for five and a half years—met him during 1931. I had transactions with Mr. Lonergan in the relationship of broker to broker. I was in his employe in the month of June 1932 to June 1933. At that time Mr. Lonergan was selling spot bullion in Seattle. I worked with him from the sales standpoint—also managing his office; it was not connected with the Seattle Metal [fol. 275] Exchange—dealt entirely in spot silver up until June, 1933. The Seattle Metal Exchange had been organized prior to that; it was put into active operation selling futures contracts in silver. I became a member broker under the name of Gill & Company; it was purely a firm name for an individual—myself. I did not contribute any money at the inception of Gill & Company to the Seattle Exchange as a member broker. I first started out in a rather small way, opening in 211 American Bank Building. I had desk space in one corner of the office of Louis Martin Company.

Mr. Lonergan was in there at different times, and met different people because of being in that office. Shortly after I began to do business, I started to arrange for space in the 1411 - 4th Avenue Building, on 4th Avenue. Through some central clearing house or whatever it is for building Superintendents, the Superintendent of the American Bank Building found that I had inquired for office space up there. He approached Mr. Lonergan and stated that he could save me money. Lonergan said he thought it better that he speak to the Superintendent. I said fine and dandy. He went ahead and made arrangements at 204 American Bank Building.

I was in Louis Martin Company such a short time I do not recall whether I participated in the rent there or not. I am not definitely clear that I paid the rent directly to the building manager. I think at the start I did not, but later on I did. Prior to the establishment of the bank account, I paid to Mr. Lonergan.

Mr. Lonergan did not contribute anything. I had a stenographer; she was employed by me; occasionally she did [fol. 276] work for Mr. Lonergan when she would not be busy, and I would permit her to do the work for him.

I was on the Board of Governors on the Exchange and participated in such meetings. I know nothing of any trust fund in that sense; I know there was a clearing house and accounts of the clearing house. Mr. Lonergan never made any mention of a trust fund; he made mention that silver was held in the Trust Department of the First National Bank of Seattle. Gill & Company operated in the buying and selling of silver, both purchasing and selling. Salesmen collected moneys on margins from investors, and turned it in to me; there were three salesmen—I had different men from time to time. Money either was turned in or was held for several days, depending upon whether or not the firm of Gill & Company needed additional margin in the clearing house. I was a member of the clearing house committee; Mr. Lonergan and Mr. Walsh were also in the clearing house association. The association had no trust fund that I know of. Moneys collected from investors, if it came in in cash, I would deposit it to my firm account in the bank, later drawing a check in favor of the clearing house. If it were an individual or firm check, I would endorse it over to the clearing house. The money was kept in the Exchange vaults; it was under the control of officers of the Clearing house. I was one of the officers of the Exchange, and one of the Board of Governors. The handling of money was left to Mr. Walsh, who was a banker of about sixteen years experience; I found him very reliable. I didn't see how I could improve or help out there. I left the handling of the Clearing House funds jointly to the two officers of [fol. 277] the Exchange and the Clearing House, Mr. Walsh and Mr. Lonergan.

I had an account with W. L. O'Connell; he was both buying and selling in the market; he was dealing through Gill & Company; the account was opened by Mr. O'Connell. He

is Mr. Lonergan's uncle. He deposited the sum of around One Hundred and Fifty or Two Hundred dollars. Several days later he instructed me that either he or Mr. Lonergan would instruct me as to the disposition of that account; finally Mr. O'Connell informed me that he would instruct me as to the handling of that account. Mr. Lonergan informed me he would instruct me as to the handling of that account. He did prior to first day silver opened three cents below the market.

Buying and selling continued up to the day the last transaction was made. All the other customers, outside of W. L. O'Connell were my own customers. I attended the meetings of the Board of Governors. At the inception of Gill & Company we collected twelve cents an ounce margin. The reduction in margin was determined by mutual consent and agreement of the brokers at a meeting—of the four brokers—Mr. Walsh, Mr. Lonergan, Mr. Goggin and myself. I know Louis Martin Company, my firm, and I believe one of the Louis Martin Company associate brokers, all had been recommending a reduction of margin. I voted to reduce the margin from twelve cents to six cents because I thought I could get more business.

On July 27, 1934, Mr. Goggin offered 25,000 ounces of silver three cents below the market; closing price that night was three cents lower than the morning; there were no buy orders; I was on the floor of the Exchange. Mr. Lonergan stated to me that this market wouldn't support that much silver on the three cent drop, it looked like liquidation; and [fol. 278] in the event there would be in the neighborhood of a couple of hundred thousand ounces, they would have to be liquidated. He didn't state the amount that would be necessary to liquidate. On Monday, July 30, 1934, nobody was buying. About that time everybody was wondering just where the bottom of the market was, and what the value of the contract was. Mr. Lonergan stated there would have to be buyers to support the market. Mr. Lonergan had suggested to me prior to that that I find buyers. I sent out a letter demanding more margin; also a telegram; I did that on my own initiative, knowing that if I didn't protect my margin accounts, my firm would suffer a loss.

Plaintiff's Exhibit No. 83 is a letter sent out by me asking for more margin; it bears my signature, by my secretary. I had already started to dictate a letter, had it formed

or partially formed. It was something like it. I noticed where Louis Martin Company had this typed, this form letter. Knowing Mr. Walsh was an attorney, I thought that possibly he had covered everything, and I wanted to be sure that I covered everything, so I took this typed form and sent these letters out. I received that form from Mr. John R. Walsh, on my request for it. The letter was sent out by mail, the girls mailed it under my direction and supervision; it was deposited in the Post Office; I never saw it actually deposited, but I have reason to believe it was. On Tuesday, July 31, the market closed approximately two and some fraction cents below the previous day's close. It wiped out some of my accounts that were low on margin; some of my customers deposited more margin; it was returned to the customers later. I didn't make a demand [fol. 279] upon W. L. O'Connell for more margin; I didn't need more margin; his account was short; it was well margined; he was selling short. That was under Lonergan's instructions. At the time Mr. Lonergan placed those contracts for the sale of future silver he deposited the margin that was required by the rules and regulations of the Exchange; it was deposited by Mr. Lonergan in the Clearing House. I checked with the clearing house and found credit to secure contracts, or credited with that account. Several of my customers came in on the 28th; 30th and 31st and the 1st of August, 1934, and I had them deposit the balance of their contracts in the escow department of the Pacific National Bank against the delivery of that silver, which I believe was sixty or ninety days away. I mentioned to Mr. Lonergan that I had customers who were going to take deliveries on their silver. Shortly after that time the Federal Government nationalized silver and by law forced everyone owning silver to turn it over; this meant that these escrow agreements were invalidated by the act of Congress; that money was returned to the people then. The effect of the nationalization of silver under the silver purchase act of June, 1934 was that they lost their margins. I want it understood that the loss was due to the nationalization of silver; my firm and everything was sold to Mr. Lonergan in consideration of One Dollar and the balancing of the assets against the liabilities. I bought a large number of contracts on Mr. Lonergan's instructions for the

account of Mr. William Piggott; all were bought in the name of William Piggott; he was Mr. Lonergan's customer.

Cross-examination:

After the Exchange came into operation it began to deal in futures—that was in June 1933. I was present at many of the group meetings of the associate brokers and salesmen; under the rules of the Exchange the broker had a per- [fol. 280] fect right to demand margin of their customers whether there was any fluctuation up or down in the price of silver contracts or not. The only relationship was between the customer and the broker; and under the signature cards or margin cards, a broker could call for the entire balance of the contract at any time if he wanted to; the public had no right or privilege of dealing on the Exchange itself; it was confined to the sale of contracts between brokers. The customers of the various brokers had nothing to do with the Exchange; they stopped when they got as far as the broker. For the ten days previous to July 27, 1934, trading on the Exchange had been very inactive; it caused a lot of inquiry in the minds of all the brokers; there was talk of trying to get the Government to support the market; there was a rumor that the Treasury Department was buying in the New York market, and to that was attributed the strength of the New York market; the Seattle market didn't have the strength that it should have had. Tender of silver was made on all outstanding contracts on the Exchange during delivery months by the brokers who had outstanding selling contracts to those who had outstanding buying contracts. Mr. Lonergan had stated repeatedly that this market couldn't deal with any outside market until the volume of its operations were sufficient to deal in units of those markets. The unit of trade in New York was 25,000 ounces; the unit of trade in Shanghai was 6,250 ounces. I had orders from customers lying in my file for two or three weeks at a time to either buy or sell silver at a given point above or below the market. The market may be forty-five now and they would leave those orders lie until [fol. 281] the market dropped to forty-four. The orders were placed by others besides W. L. O'Connell. That is what is known as receiving (resting) orders in anticipation of a change in the market. The margin required from all

customers was not inevitably the same. Higher margin was asked if the party was not familiar in trading; if a man was familiar in trading in wheat futures, or something like that, I didn't require as much. I maintained my own set of books and ledgers. The customers did not close out their accounts with the Exchange—they closed out with my firm.

Redirect examination:

The books of Gill and Company disclose that a number of customers closed up their accounts from time to time during the operation of the Exchange prior to July 27th, at a profit. A fair number. At the time of the final closing of my books anyone having profits due them, received them. Only those who had defaulted on their contracts were wiped out. Not all of them defaulted. Some of them placed their money in the banks. Their initial margin deposit was lost.

(Witness excused.)

Testimony of E. M. WHELAN, called as a witness on behalf of the United States.

Direct examination:

My name is E. M. Whelan; I reside in Medford, Alaska; I am a placer miner. I am acquainted with Mr. Lonergan (witness identifies Mr. Lonergan); I had dealings with him in silver bullion. I purchased three bars of silver. I did not have any contracts or dealings on silver futures with Mr. Lonergan or any company connected with the Seattle Metal Exchange. I did not authorize my name to be used nor did I deposit any margin.

[fol. 282] Cross-examination:

If Mr. Lonergan handled any account for futures using my name to designate the account, I don't think I would have any objection. I have been brought all the way from Alaska to testify to what I have just testified.

Testimony of WALTER DUTTON, called as a witness on behalf of the United States.

Direct examination:

My name is Walter Dutton; I reside in New York City. I am secretary of the Commodity Exchange Incorporated of New York. The Commodity Exchange provides a place for its members to trade in futures contracts in rubber, silk, hides, copper, tin, lead and zinc, and prior to the nationalization of silver for trading in silver. It provided a place for its members to deal in silver futures contracts between June 20, 1933 and July 27, 1934; and the Commodity Exchange of New York was the New York futures market for silver. It ceased operations or dealing in silver futures contracts on August 9th—at three minutes after twelve to be exact, I have been connected with the Commodity Exchange business for a little over ten years and with the Commodity Exchange of New York since its inception, May 1, 1933. That was a consolidation of four other exchanges; the rubber exchange; the hide exchange; the metal exchange and the silk exchange. I had communications with Mr. Pierce Lonergan between June 1933 and July 1934. Plaintiff's Exhibit No. 85 consists of a letter from Mr. Lonergan dated June 4, 1934, in which he asked [fol. 283] regarding memberships qualifications; the copies in the exhibit are the copies of my communications with him.

(Plaintiff's Exhibit No. 85 received in evidence.)

We never received any applications for membership from Mr. Lonergan. The trend of the price on silver futures contracts on July 16th showed the July position was selling at about forty-six cents and a fraction; it went up a little and declined; came up a little and declined again until on July 30th it closed at 46.02, a trifle lower than the closing price on the 16th of July—a net decline of about sixty points.

In connection with the Commodity Exchange of New York, we have four clearing associations; the Commodity Exchange metal clearing association cleared the silver contracts. All members of the exchange were eligible to membership but I think there may have been fifty-five firms who were members of the clearing association. The by-

laws of the clearing house association required that all contracts made on the exchange should be cleared through the clearing house and members who were not members of the clearing house who executed contracts turned their contracts over to one of the clearing members to clear for him. The contracts lose their identity, so to speak. Of course the members of the clearing house had their customers whose contracts they had to put in for clearing, but the clearing house didn't know the customers. The clearing house knew only the clearing members who turned the contracts in.

Plaintiff's Exhibit No. 86 is the daily market report or a group of them. All the information is prepared by the [fol. 284] exchange and proof-read by the exchange members. These reports cover from July 2nd to August 9th.

(Plaintiff's Exhibit No. 86 is received in evidence.)

On July 27, 1934, on the Commodity Exchange in New York, the opening transactions were at 45.95 and forty-six cents; the September position, for forty-six cents and 46.02; in the December position there was a bid of 46.25; in the March position there was a bid of 46.90 and an offer at 47.20. The forward months are a little higher priced. On the 30th day of July, July was traded at forty-six cents; the closing price was nominal, there having been no bid or offer at the closing; September position at the opening was bid at forty-six, offered at 46.25; the closing price was set up at 46.03 bid; on the December position, it was traded at 46.25, closing price 46.20 bid; on July 31st, September was 46.18 bid, offered at 46.45; the closing price was 46.45 bid. December, bid 46.43, offered at 46.90 on the opening and the closing was 46.70 bid. On August 9th, September was traded at 48.70; December was bid at 49.15 and offered at 49.33; closing price that day for all positions was fixed at 49.96, that corresponding to the Government's fixed price of 50.01 for one thousand fine ounces, we trading in 999 fine ounces. August 9th was the day the trading was suspended at noon. The Commodity Exchange is under the governorship and control of the members primarily but there was a Board of Governors of thirty-eight members chosen by the members that have control of the operations of the exchange. During the period July 1, 1934 and August 9, 1934 the trading was more or less inactive; it was [fol. 285] inactive from June on. It wasn't entirely in-

active but the trading was considerably reduced. There was no connection between the Commodity Exchange of New York and Shanghai or Bombay, nor between the New York Commodity Exchange and the Seattle Metal Exchange. If a trader here (Seattle) had silver bullion in Seattle in a vault or in storage, or if a trader situated in Seattle had silver stored in a bank or vault in New York, it would be possible for that trader here to sell that across the Commodity Exchange of New York, if it was one of the dependable brands and deliverable from a licensed floor, and in a quantity of 25,000 ounces.

A discretionary account is an account where a customer gives an order to a broker to use his judgment in buying or selling—gives him discretion. A wash sale is where a man buys and sells—it is generally used for the purpose of rigging the markets—something of that kind.

The only ones permitted to deal on the floor of the Commodity Exchange are members of the Exchange. Customers are not permitted to make contracts on the exchange itself. There may have been six or eight brokers perhaps actually participants in the silver exchange itself. The commission house is one that handles business; takes business and executes orders for customers. In our exchange we have men who are identified with a particular commodity; for instance we have rubber importers and dealers, silk importers and dealers and we have metal dealers. They generally trade for their own accounts. Generally speaking, they are called dealers. There are traders too who trade for their own accounts but they may not be identified [fol. 286] with any particular trade. The open outcries between the brokers are called the bids and offers. After the day's trading is over these traders sign buy and sell slips which are turned in to their respective offices and from there the clearing house sheets are made up. The actual sale on the exchange is a rather informal procedure, being simply a meeting of two persons as they make their bid and offer, and is later confirmed in the records and books of the company by use of these confirmation slips.

On the 9th of August when the government proclamation stopped trading on the silver market, the only transaction that took place was that at the end of the day the brokers submitted their sheets showing an offset for the amount of long or short orders that they had so that their balance

with the clearing house would be wiped out. In other words, if I were a broker on that exchange and had a thousand long contracts on August 9th (when the order came), I simply introduced my sheet at the end of the day showing the sales to offset those buys, and no actual contracts were affected. We had authority by regulations issued by the government to close the books in that fashion without paying fifty percent profit tax on those transaction-.

(Witness excused.)

Testimony of HARRIS MAYNARD CASEY, called as a witness on behalf of the United States.

Direct examination:

My name is Harris Maynard Casey; I live in the City of Seattle, Washington; I am an uncle by relation to the [fol. 287] defendant, Pierce Lonergan. I did not purchase any contracts for future delivery of silver through the Seattle Metal Exchange or any of its associate brokers, nor did I sell any. I deposited no margin, nor did I withdraw any money. I did not authorize the use of my name.

Cross-examination:

I am the husband of Mr. Lonergan's mother's sister; I have known Mr. Lonergan probably thirty-five years. I have known him since he was almost a kid—very close friends. I knew him when he worked on the grade to earn money to get through the university, and when he was a lawyer he was my lawyer when I had law business. We have been in business together and I took his advice. I had entire confidence in him. I had no objection about his using my name.

(Witness excused.)

Testimony of W. L. O'CONNELL, called as a witness on behalf of the United States.

Direct examination:

My name is W. L. O'Connell I reside in Seattle; my regular business has been in the lumber and shingle busi-

ness; I am an uncle of Pierce Lonergan. I purchased silver futures contracts; I purchased just a small number; I also sold. I had no dealings with the Seattle Metal Exchange; I dealt with the broker, Gill & Company. I deposited margin, probably between three to five hundred dollars. When I sold out I think I drew down some. My dealings with Gill & Company were before July 1934. I permitted the use of my name by Gill & Company in transactions other than those I have mentioned and I had no objections. My credit was good for almost any amounts. I didn't put [fol. 288] up the actual cash.

Cross-examination:

I informed Mr. Gill that Mr. Lonergan had discretionary right to order purchases or sales for future delivery on my account. I think I drew down approximately what I put up. I have known Pierce Lonergan since he was born. I know he has made an extensive study and research on the subject of silver and extensive efforts in establishing a silver market in Seattle His efforts were absolutely sincere and honest. I think he was the best informed man on the subject in the State of Washington.

(Witness excused.)

Testimony of PATRICK DINEEN, called as a witness on behalf of the United States:

I live in Grants Pass, Oregon; I am acquainted with Mr. Lonergan; he used to be my attorney. I did not purchase contracts for future delivery of silver through Mr. Lonergan. I advanced him two thousand dollars to start with Mr. Goggin, somewhere around the 10th of July 1933. I didn't purchase any silver contracts with that money; subsequently I did on July 3, 1933, the sum of $750.00 from Gill & Company. I turned the account over to Mr. Lonergan to be used in futures contracts. The two thousand dollars was to be used for starting the Exchange; the sum as margin he handled as he wanted to use it. I authorized him to use my name. I did not deposit margins for $23,869.86, nor did I withdraw $15,031.53. Mr. Lonergan had authority to use the money as he wanted to use it.

Cross-examination:

[fol. 289] I have known Mr. Lonergan about 18 years.

(Witness excused.)

Testimony of GEORGE FRANK REA, called as a witness on behalf of the United States:

My name is George Frank Rea; I live at 1054 East 97th (Seattle). I am employed in the Special Delivery Terminal Post Office—United States Post Office service. Plaintiff's Exhibit No. 11 consists of a letter and envelope. This is my writing here, and numbers, figures, indicating on what sheet this letter was entered. It was delivered by me to the desk of the Sorrento Hotel, signed for by somebody at the desk.

Cross-examination:

I never saw this letter until yesterday. The only thing I know is from notations on the envelope that were made by myself. I have no independent recollections of delivering this letter. I merely go by my records. The letter was merely left and signed for at the hotel desk.

(Witness excused.)

Testimony of WILLIAM PIGGOTT, JR., called as a witness on behalf of the United States.

Direct examination:

My name is William Piggott, Jr. I reside at Seattle, Washington. I did not purchase any silver contracts on July 31, 1934, or at any time thereafter through any member of the Seattle Metal Exchange, nor did I deposit any margin or any orders for the purchase of silver futures contracts. I never bought the contracts shown in the option ledger of Pierce Lonergan & Company, being Government's Exhibit [fol. 290] No. 23-B. Mr. Lonergan thought there might be a chance in the future of possibly making some money buying this particular commodity. We came to no agreement at all except that he was to act as a broker to the extent that if any purchases were made or a sale consum-

mated at some time, that he was to get his natural commission as established by the rules of the exchange.

Cross-examination.

I am familiar to a certain extent with Margins and the operations of stock markets and commodity markets and am identified with a number of business enterprises in the city. I have known Mr. Lonergan several years, possibly five. I have heard of him considerably longer than that. I knew he was interested in an effort to establish a silver exchange. I know Mr. Lawrence Arnold of the First National Bank; I talked to Mr. Arnold about this proposition. The signature on Defendant's Exhibit A-21 is my signature, and I received that through the mail, the original.

(Defendant's Exhibit No. A-21 is received in evidence.)

The initials at the bottom are L. M. A. I believe Mr. Arnold had it (defendant's Exhibit A-21) typed and handed it to me. The purpose of having a letter of credit was to have the money available so there wouldn't be any delay in the event Lonergan could show a proposition where I could make a profit. In my experience the practice of brokers is that if I place an order it is more or less verbally, but they don't submit them, they don't bring them back usually for my signature.

Redirect examination:

[fol. 291] The arrangement at the First National Bank is a credit established for my own account, and as I explained or told Mr. Lonergan, that if at any time he was able to develop a transaction that looked acceptable to me, the credit was available if I agreed to complete the transaction and accept whatever profits were shown to me. The deal was, or the situation was that I was not speculating in the market, that if in the ramifications of the stock exchange he had a firm purchase order and a firm sale order, that by putting up credit and taking both sides of the transaction I could develop a profit in there, why, I was willing to *to* through with that. He never had brought any particular transaction in that was complete. I never received any confirmation that silver futures contracts had been purchased in my name.

(Witness excused.)

Mr. J. H. Roche (recalled):

I have already been sworn; my work is accounting; I took my work in accounting at the Pace Institute, Washington, D. C. and at the University of Southern California, Los Angeles. For approximately six years I have been an accountant with the Department of Justice and I have made examinations involving banks, brokerage houses, exchanges and various mercantile businesses. I have also been supervisor of accountants who were doing work touching brokerage and exchange accounting. I have made an investigation of the books of Lonergan & Company.; Gill & Company, Seattle Metal Exchange and Louis Martin Company. I have never received any books of P. A. Jordan Company for examination. Government's Exhibit No. 38 [fol. 292] is the bought confirmations of P. A. Jordan & Company. Government's Exhibit No. 37 is the sales confirmations of P. A. Jordan & Company; Government's Exhibit No. 40 is the pit cards of P. A. Jordan & Company; Government's Exhibit No. 39 is the contract slips of P. A. Jordan & Company. (Witness identifies Government's Exhibits Nos. 22-A; 22-B; 23-A; 23-B; 24-A; 24-B; 25; 26-A; 26-B; 27-A; 27-B); these are all the ones that are in evidence. These accounts are involved and require an expert; to determine the transactions which went over the Seattle Metal Exchange it was necessary to take the contract slips which appear among the records of the Exchange and among the records of the various brokers, and determine the number of transactions that took place between the brokers on each date during trading in the different contracts months. Then to prove the total of those transactions against the trade sheets of the Exchange, and then it was necessary too, they lead into thousands of contracts that were traded between the different brokers; then it is necessary to take the confirmations that appear among the brokerss' records and determine for whose account the broker acted in making the purchases and making the sale. An ordinary layman couldn't take the books and get the information that is material to the transactions, determine the nature of them or any facts that are material to the transactions.

Q. Have you had any previous experience in connection with auditing or working on books of any futures commodities exchange?

A. No.

Q. And the method of accounting, as you have found in your investigation in this case, is considerably different [fol. 293] from the ordinary method of accounting in ordinary commercial lines, is that not true?

A. Well, in ordinary commercial lines, yes, but in——

Mr. Tong: I object that this witness's qualifications——

Mr. Dennis: Just a moment. Wait till he answers your question.

The Witness: It is not essentially different. It is of the same character as accounting for stock exchanges, and I have done that.

By Mr. Tong:

Q. Are you a member of the American Institute of Accountants?

A. No.

Q. Are you a Certified Public Accountant?

A. No.

Q. And you merely work for the Department of Justice, or the Government, in the accounting capacity?

A. Yes.

The Court: The Court is ready to rule upon this matter.

Mr. Tong: I object, Your Honor, to any testimony from this witness of an expert nature referring to, or concerning the results or conclusions based upon his examinations of the books referred to as the Government's exhibits heretofore received in evidence, on the ground that he has shown that he has had no previous experience with exchange books, or with the books of futures commodities exchanges, he is not a Certified Public Accountant, and his qualifications do not make him eligible to give an opinion or to form a conclusion from the work that he has done that would be in any way binding, or that would have any probative effect in this matter.

The Court: The objections are overruled. The Court rules that he is qualified, and he may testify as an expert in this case.

Mr. Tong: Exception, Your Honor.

[fol. 294] The Court: Exception allowed.

Witness (continuing): There are no records here containing any bank statements or cancelled checks of Pierce

Lonergan Company; the account was kept in the Pacific National Bank of San Francisco, one in the First National Bank of Seattle, one in the Pacific National Bank of Seattle and one in the Bank of California. They were the bank accounts of Pierce Lonergan, not the accounts of Pierce Lonergan Company. The firm of Pierce Lonergan Company was composed of Pierce Lonergan. The bank accounts of Gill & Company according to the bank statements and records were kept in the Bank of California here in Seattle; Louis Martin & Company with the Pacific National Bank of Seattle; P. A. Jordan & Company with the National Bank of Commerce, Seattle. There were no bank statements or cancelled checks of the Seattle Metal Exchange and I don't know if they had a bank account.

I don't have the number of transactions in the name of H. M. Casey. The total is 667 sold and 258 bought up to and including July 25, 1934. Referring to the transactions of LaPlant, the books do not disclose how much money, if any, was paid in by LaPlant; there were no books of P. A. Jordan & Company here. I mean there was no general ledger, cash, operating journal and purchase and sales journal for P. A. Jordan & Company. There are some other records and confirmations but no book entries of the concern. The books of Pierce Lonergan & Company showed that William Piggott deposited $22,650.83; there is no disposition shown of that amount. There are no books showing any money paid in by Edward Schmidt's account, which is among the records of P. A. Jordan & Company. [fol. 295] The account of M. A. Shephard shows among the records of Jordan & Company. The records do not disclose how much money, if any, was taken in. As of July 25, 1934 the contracts outstanding at the Seattle Metal Exchang were deliverable in the months of September, 1934, December 1934 and March 1935. Trading in contracts for September 1934 delivery began on December 12, 1933; trading began in contracts for December 1934 delivery on March 19, 1934; trading for March 1935 began on June 19, 1934. Subsequent to July 25, 1934, 189 sales contracts standing in the name of O'Connell in the records of Gill & Company were cancelled. As far as my testimony goes the records introduced here show the complete transactions of P. A. Jordan & Company in futures contracts for September and December 1934 delivery and March 1935 delivery up

to and including July 25, 1934. They are not the complete records of the books of P. A. Jordan & Company. I don't need any other records for the testimony that I am giving. As of July 25, 1934 there were 269 contracts for the purchase of September, December and March delivery outstanding on the records of P. A. Jordan & Company. Subsequent to July 25th, fifteen contracts in the names of customers were transferred to Lonergan and Company and cancelled. I have no records to show the disposition of 254 contracts in the name of Shephard. There were 925 contracts for the sale of silver, 471 in the name of LaPlant and 454 in the name of Schmidt. There are no records available to show what disposition was made of those contracts subsequent to July 25, 1934. As of July 25, 1934 there were 217 contracts for the purchase of silver on the records of Lonergan & Company; on July 31, 1934 eleven contracts of customers were sold by Lonergan & Company to P. A. [fol. 296] Jordan & Company, who bought for the account of William Piggott; and the remaining 216 contracts in the name of P. Dineen were shown as cancelled. Of the 501 sales contracts, 497 in the name of Ginsberg were cancelled, and four in the name of P. Dineen were cancelled. As of July 25, 1934, there were 122 customers who purchased contracts for the sale of September, December and March delivery outstanding, on the records of Martin & Company. On July 31, 1934, 765 of such contracts were sold; 234 of these to Martin & Company who bought for the account of William Piggott; 268 to Jordan & Company, who bought for the account of Pierce Lonergan, and William Piggott; and 263 to Lonergan & Company, who bought for the account of William Piggott.

On August 7, 8 and 9, 1934, 177 customers' contracts were sold by Martin & Company to P. A. Jordan & Company, who bought for the account of Lonergan & Company and William Piggott; 39 were sold on August 14, 15, 16 and 21, 1934 to Lonergan & Company who bought for the account of William Piggott, and 141 were cancelled. As of July 25, 1934, there were 90 sales contracts which were cancelled.

$13,900.00 was paid in by H. M. Casey and $10,901.92, paid to H. M. Casey.

Patrick Dineen sold 973 contracts and bought 1032, paid in $23,869.86—withdrew $15,031.55.

Victor Ginsberg, 618 sold; 121 bought, $2,500.00 paid in; $2,240.40 paid out.

George Goggin, 3,369 sold; 797 bought; $17,311.16 was withdrawn; $15,820.29 paid in.

LaPlante, 1197 transactions—701 sold, 496 bought.

W. D. O'Connell, 1285 sold, 1195 bought. Paid in by [fol. 297] O'Connell, $16,963.75, paid out $9,800.00.

William Piggott—1,082 contracts of a value of $223,593.72; he deposited $22,685.83.

Edward Schmidt, 464 contracts bought.

M. A. Shephard, 198 contracts sold, 254 contracts bought.

E. W. Whalen, 782 contracts sold, 456 contracts bought; $18,675.00 paid in; $16,400.00, withdrawn.

In all there were 6,339 contracts sold and 5,073 contracts bought in the names of O'Connell, LaPlante, Schmidt, Shephard, Ginsberg, Goggin, Dineen, Casey and Whalen.

On July 25, 1934, there were 1,245 purchase contracts of customers on the records of the four brokers, representing 622,500 ounces of silver. Of these, 1082 were sold, all bought for account of William Piggott. The remaining 163 contracts were cancelled.

Of the 4,816 contracts in all over the exchange, 1983 represented transactions where Casey, Dineen, Goggin, Ginsberg, LaPlante, O'Connell, Schmidt, Shephard and Whalen were on both sides of the market. Of the 4,816 contracts, 4 were for contracts where customers were on both sides of the market.

According to the records of the Seattle Metal Exchange, the total amount of margins on deposit with the Seattle Metal Exchange on July 31, 1934, as shown from Plaintiff's Exhibit No. 27-A was $33,115; $5,320 of it was paid in cash to Gill & Company; $18,120 was paid in cash to Jordan & Company; $710.63 was paid in cash to Lonergan & Co. $5,633.07 was paid in cash to Louis Martin Company and $954.34 was used to cover an amount of Lonergan & Company owed to the Exchange or to the Clearing House, and $2,376.93 was used to cover an amount Louis Martin & Company owed to the Clearing house. The face of the records [fol. 298] do not show what margins were left in the name of customers. That is only the margin of the brokers with the exchange or with the clearing house.

Mr. Tong: At this time I would like to move to strike from the record the testimony of the witness relating to

the sales shown by the records, the alleged disposition of contracts shown by the records, on the ground that the testimony is entirely irrelevant, has no bearing on the issues involved in this case, and has no probative value insofar as those issues are concerned.

The Court: The motion is denied.

Mr. Tong: Exception, please.

The Court: Exception allowed.

Cross-examination:

The figures I have given are of the margin paid into the clearing house by the brokers and are the brokers' margins. The disposition of that margin account as shown by the various items is partly as a credit to those brokers, and the clearing house margin account was entirely disposed of on the record of July 31, 1934. The crediting of the various amounts were credited by reason of profits from sales or contract differences from sales that had accumulated up to that time and showed as a balance of margin in the clearing house. It would represent two items, amounts put up by brokers as margins or outstanding payments, and the payments or disposition of the credits to those firms, and those were the amounts which the brokers would be entitled to receive. None of the daily closing sheets are available and those closing sheets would show the individual transactions on the Seattle Metal Exchange. The daily trade sheet, the yellow sheet that I have before me, showed merely the accumulative total of each day's trading, but does not show any [fol. 299] detail as to individual transactions. Referring to the pit cards of Jordan & Company, I haven't checked through those pit cards and don't know if all the pit cards are here or not.

(Plaintiff's Exhibit No. 84-A received in evidence.)

Plaintiff's Exhibit No. 84-B is the records of Lonergan & Company, the contract slips, pit cards and confirmations.

(Plaintiff's Exhibit No. 84-B received in evidence.)

The records of Gill & Company, consisting of pit cards, contract slips, confirmations, customer's statements and bank statements with cancelled checks are shown in Government's Exhibit No. 84-C.

Defendant objects on ground no foundation connecting defendant; further grounds that they were irrelevant, in-

competent and immaterial; objection overruled; exception taken and allowed.

(Plaintiff's Exhibit No. 84-C received in evidence.)

The records of Louis Martin Company, consisting of confirmations, contract slips, customer's statements, pit cards, bank statements and cancelled checks are set forth in Plaintiff's Exhibit No. 84-D.

Defendant makes same objection as above (84-C); objection overruled; exception taken and allowed.

(Plaintiff's Exhibit No. 84-D received in evidence.)

My testimony refers to a period from December 12, 1933, to and including July 25, 1934. For the period after July 31, 1934 the pit cards are not complete. I can't say whether they are complete for the period from December 12, 1933 to July 31, 1934. I only used the pit card where it was necessary to match or trace a contract that couldn't be otherwise traced. There might be a difference of opinion as to [fol. 300] whether one contract would be in the name of a certain street name or another street name, and for that I used the pit cards. The contracts the broker- entered into with each other would first be entered on the bought and sold sheets and then the totals transferred to the closing sheets and then the entries on here should be made on the closing sheets. The contract slips that I used were mostly from the records of the Seattle Metal Exchange and were signed in all instances by the buying broker. I do not know anything about who made up the contract slips nor how they were made up on this exchange. Those on the exchange record were signed by initials. Among the brokers' records some of them were not signed and some of them were signed. I wouldn't say there is a contract slip among the exhibits for every transaction shown on the three delivery months on this trade sheet. There are a large number of sheets in the records of Norman Edward Company, particularly the option ledger sheets, wherein the earlier transactions before Norman Edward started are not shown. The option ledger does not show to whom the sale was made, nor does it show from what broker the purchase was made, and neither a credit balance nor a debit balance at the finish of the business. The option ledger account of Lonergan & Company at the close of the books show that P. Dineen still

has a credit of $5-88.07; it was transferred from the option account to the accounts payable. As of July 31, 1934 the Casey account was entirely closed out by purchases or sales; it had been closed out before July 25. There were no transactions on the Casey account after that day. The method of cancellation was to mark the books cancelled. As of July 31st none of the so-called street accounts were involved on that date except William Piggott. All the pur-
[fol. 301] chases as of July 31 were for the account of William Piggott. The accounts of LaPlant were wound up on the exchange after July 13th by process of offsetting against each other. I can't tell what the 266 long contracts were offset against. All long contracts and all short contracts, with the exception of a few long contracts were in the names of the various streets accounts and then they were just offset on the exchange. The exchange record on about June 18 shows where the brokers were buying and selling but there were no other records to show for whose accounts they were acting on those sales. As far as I am concerned, Norman Edwards was treated as a customer of Louis Martin & Company; no transactions are shown to have taken place between July 25 to July 31 for the street accounts, and that was the time of the so-called crash of the market. The contracts between the member brokers do not refer to the name of the customer for whose account trading is being made. The broker on the opposide side of the transaction merely knows at that time that he is dealing with member brokers; he does not know whether the member broker is dealing for his own account or John Jones or Harry Smith. The summaries for the totals of the street accounts cover transactions from September 12, 1933 down to and including July 25, 1934 except June options; and it is only in June options up to June 13, 1934. During that period they were trading other options too, but I haven't done any work on those other options. I don't recall seeing any rules or regulations of the clearing house association. The individual ledgers of Gill & Company, Martin & Company and Lonergan & Company would generally show the transactions that took place for the account of each one of the customers or a street account. It would show all the details. I have never made any effort to find out how much money Norman Coles got out of the deal or how my work in con-
[fol. 302] nection with this case was not intended to be a

complete audit of the books. I wouldn't check every time to audit a certain account and I wouldn't see that the totals were correct; it was supposed to be a complete investigation. I wouldn't have any total of the amount that Mr. Lonergan either put into the Seattle Metal Exchange or the clearing house or Pierce Lonergan Company. My summaries only cover certain portions of the investigation.

The principal part of the testimony that I have given is in connection with the transactions on the Seattle Metal Exchange, in particular option months over a certain period of time, to determine, first, the number of open transactions on July 25, in whose accounts these contracts were held, what disposition was made subsequent to that date; and then further to determine the extent of the trading in the so-called street names. I never made any inquiry regarding the vault records or the money that went in and out. I don't know who was giving the orders on the Casey account, nor the Dineen account. The summary refers to the number of contracts, not the number of transactions. Between the period of June 1 and July 25, 1934 there were 502 contracts; customers sold to street names 149; street names sold to customers 264, or a total number of transactions in September contracts of 915. In contracts for December 1934 delivery there was a total during June and July, up to July 26, 1934, of 912 contracts traded. Customers sold to street names, 52; street names sold to customers, 716, and customers sold to customers, 4. I haven't any totals covering the transactions after the silver legislation became effective June 19, 1934. After July 27 there were 1082 contracts of customers which were sold, and all bought for the account of William Piggott. There were no con- [fol. 303] tracts for the purchase of silver by anyone other than Piggott and none of the street accounts were involved in any way after July 27. The largest amount of trading was in contracts for December delivery and March delivery; the biggest one was the Pacific National Bank of San Francisco, which had previously in May 1934 sold through Jordan & Company. They bought in to cover their short position, two hundred contracts. The Pacific National Bank was a customer's account. The next heaviest customer's account was the Norman Edward Company; I haven't their total purchases added up. On May 10 there were fifty contracts sold by Jordan & Company for the Pacific National Bank by Martin & Company. On the same date they

sold fifty contracts bought by Gill & Company for O'Connell, and on the 11th there were fifty contracts sold which were bought by Gill & Company, and on the 18th there were fifty contracts sold which were bought by Lonergan for Ginsberg. When the Pacific National Bank sale was made it was made through Jordan & Company, and when they liquidated the short position they bought through Jordan & Company. The closing sheets take into account the closing market price and the outstanding net position of each member broker, that is the settling price, so that the broker would receive on his account credit or debit on the contract difference. Every day the member broker would be required to either increase his margin account or be entitled to withdraw from his margin account. The method used was to charge margins with the amount of the settlements, and then the broker would make good whatever required margin he needed to close business to that day, [fol. 304] or in the other case he would withdraw in case his settlement was in his favor. His margin would be credited and then he could withdraw any excess margin.

Redirect examination:

After July 27 all the street accounts were outstanding and there were some customers accounts outstanding. Every contract sold in July 1931 and during August was bought for the account of William Piggott. The rest of the accounts—the 163 customers' accounts, were cancelled. I can't give any disposition of the Jordan & Company account.

(Witness excused.)

[fol. 305] Testimony of MARY L. HERMAN, Called as a Witness on Behalf of the United States.

MARY L. HERMAN, called as a witness on behalf of the plaintiff, being first duly sworn, testifies as follows:

Direct examination:

My name is Mary Louise Herman. I reside at 4418 Phinney, Seattle. I am a stenographer.

The latter part of 1933, and up to August 1934, I was employed by Louis Martin & Company—Mr. Walsh. I am

familiar with his signature. Mr. Walsh's signature is on the bottom of plaintiff's exhibit 11. I know there were a number of these letters sent out. My particular duties with Louis Martin & Company were to keep books, and I take letters under the supervision of Mr. Walsh. I made the entries of the name of Casey and Mr. Whalen, under the orders of Mr. Walsh.

Outside of Martin & Company, I kept books of Jordan & Company under the supervision of Mr. Goggin.

Cross-examination:

All my work for Louis Martin & Company was under the supervision of Mr. Walsh.

Testimony of MARGARET ELLEN ROLAND, Called as a Witness on Behalf of the United States

MARGARET ELLEN ROLAND, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination:

My name is Margaret Ellen Roland. I reside in Seattle, Washington. My occupation is a secretary. The latter part of 1933, the forepart of 1934, I did Mr. Gill's secretarial work, and kept the books. I am acquainted with the [fol. 306] signature of Mr. Gill. Plaintiff's Exhibit 83 has on it Mr. Gill's signature signed by myself. In keeping the books of Gill & Company, I acted under the supervision of Mr. Gill. He was my employer.

I checked the books for Pierce Lonergan & Company under the supervision of Mr. Lonergan.

Referring to plaintiff's Exhibit 83, I could not say exactly how the letter was sent. I do not remember mailing it. There were other girls in the office.

(Witness excused.)

Testimony of Mr. Charles L. LeSourd, Called as a Witness on Behalf of the United States

Charles L. LeSourd, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct testimony:

My name is Charles L. LeSourd. I reside in Seattle, Washington. I am Vice-President and Manager of the Trust Department of the Seattle First National Bank, and had the same position during 1933-'34.

Transactions with Mr. Lonergan began in this particular instance in December, 1933. Mr. Lonergan had arranged with the corporation known as Eddy Investment Company to borrow certain sums of money to invest in silver bullion, and requested our bank to act as an escrow agent under an agreement in which a 15% margin was to be held in value. In other words, in cash or in silver bullion at market value. Cash in the sum of $12,000.00 was loaned by Eddy & Company, and deposited with us.

Mr. Lonergan deposited $3,000.00 cash on that day, and [fol. 307] we were directed by Mr. Lonergan to buy silver bullion through Wells Fargo Bank & Union Trust Company at San Francisco, in the total number of 24893.13 ounces. The original agreement was dated December 7, 1933, between Eddy Investment Company and Pierce Lonergan & Company of Seattle. Plaintiff's Exhibit 87 is the original agreement.

(Plaintiff's Exhibit No. 87 received in evidence.)
(By order of the court a copy is substituted for the original.)

At Mr. Lonergan's request, the silver was sent to the United States Mint at San Francisco, and re-minted into bars of 500 ounces each. The mint deducted 146.03 ounces for their service.

The actual silver shipped and delivered to us and placed in our vault was 24,747.10 ounces. There was a sufficient amount of silver and cash during all of the time this account was running, so that the cash and silver together offered the 15% margin.

A supplementary agreement was entered into by the same parties under the terms of which an additional loan

was made by Eddy Investment Company to Mr. Lonergan of $45,000.00. Plaintiff's Exhibit 88 is a copy of the original agreement, dated December 13, 1933.

(Plaintiff's Exhibit No. 88 received in evidence.)

As against the second loan of $45,000.00, December 14th, at the request of Mr. Lonergan, we purchased from Mr. Fred Everett, who resides in Seattle, silver bullion which was located in the safe deposit vaults of the National City Bank in New York. The number of ounces purchased was 99,911.99. On December 13th, Mr. Lonergan had deposited in cash with us $8,105.00. The total advanced by Eddy Investment Company to Mr. Lonergan was $57,000.00. Later [fol. 308] there was an additional advance of $2,500.00, covered by silver as collateral, which exceeded the loan by 15%. The margin was kept at all times. The third loan, $2,500.00 was made on August 11th, 1934. On July 25, 1934, we received the proceeds from the sale of silver held in the National City Bank in New York. We continued to hold the silver in our vaults that was purchased from Wells Fargo. Plaintiff's Exhibit No. 85 consisted of instructions of Mr. Lonergan and Mr. Walsh in regard to the sale in New York of approximately 99,000 ounces of silver bullion. Instructions were received in a letter signed by Mr. Lonergan, dated July 31, 1934, one signed by Mr. Lonergan, concerning the authorizing and directing of the sale, and a similar one by John P. Walsh instructing us to sell. They related to a partial closing out of their account.

(Plaintiff's Exhibit No. 89 received in evidence.)

The sale was by the National City Bank of New York. The price received was 46¼ per ounce. Sale was made July 25, 1934.

Cross-examination:

The original agreement was drawn by Mr. Lonergan, and checked by counsel for Eddy Investment Company, John W. Eddy, formerly of Skinner & Eddy. Mr. John W. Eddy is a director of our bank.

I had many other dealings with Mr. Lonergan than those dealings. I have known him for twenty years or more. He is a lawyer. We took Mr. Lonergan's advice to a very large extent. Up to that time, a transaction of that account

had not been handled by a local bank. New York and San Francisco are the principle places in the United States where it is handled.

In connection with these transactions, I met Mr. Loner-
[fol. 309] gan almost daily. He was very much impressed with the possibilities of buying silver bullion. He particularly predicted that there would be an inevitable rise in the price of silver. I know the price went up. As far as being a good prophet, Mr. Lonergan is right. He certainly was enthusiastic. He had considerable knowledge of foreign exchange on the question of silver. His transactions were perfectly straight in every way.

After the last of the silver had been delivered to the assay office down here when the Government called for silver, I believe there was a loan of $1,000.00 or something like that, that the bank made after the silver had been delivered there. The loans were all paid. Frequently there was cash withdrawn from the account—I would not say daily, but very frequently, when there was an excess of collateral, Mr. Lonergan would come down, and we would pay him whatever the excess was. And if he were short, we would give him a call, and he would come down and cover the shortage. Sometimes the cash or silver was put in and taken out. In one or two instances, silver was both deposited and withdrawn.

Redirect examination:

The 24,000 ounces of silver or the 32,000 ounces of silver was delivered to the Assay office, and we received the proceeds from the Government in August, 1934. The principle remittance was received by us August 31, 1934. The price was about 50. In March 1934, he withdrew silver, the amount of 982.5 ounces, and paid us at that time $443.35.

Recross-examination:

At one time Mr. Lonergan asked us to send some silver to Spokane. We sent it over there. Some of this silver was in our vault, or was in the Pacific National Bank of Seattle, but under our control. The large block was in
[fol. 310] the National City Bank of New York. The President nationalized silver by proclamation August 9th. The silver was not sold until late in August, and the small bal-

ance of $125.36 was not received by Mr. Lonergan until the 7th day of September, 1934.

(Witness excused.)

Testimony of Mr. W. G. Coventry, for the United States (Recalled)

Witness W. G. Coventry was recalled:

I have seen Plaintiff's Exhibit No. 11, at the Assembly Hotel in possession of Mrs. Lyman. The letter was in an envelope. The seal was unbroken. I broke the seal myself. This is the letter that came out of the envelope.

Mr. Hughes: At this time, if the Court please, I offer into evidence what has been marked for identification as Plaintiff's Exhibit No. 11. And I might point out to the Court that that is one of the indictment letters that Count No. 6 is predicated upon.

Mr. McDonald: If your Honor please, there is no sufficient identification yet as to who sent it, no foundation laid, and I insist there still isn't sufficient evidence to identify this as——

The Court: The signature of the person who signed the exhibit has been identified by a witness here.

Mr. McDonald: That doesn't prove it was sent.

The Court: The objection is overruled.

Mr. McDonald: Exception.

The Court: Exception allowed. Plaintiff's Exhibit No. 11 is now admitted in evidence.

(Plaintiff's Exhibit No. 11 received in evidence.)

[fol. 311] Mr. Hughes: That is all.

Cross-examination:

Witness (continuing): When I was previously on the stand before this jury, I did not state that I did not know whether or not this letter was mailed. I did not state that I did not know. I did not so testify to the best of my knowledge.

(Witness excused.)

Mrs. Charlotte Dorothy Coventry, Called as a Witness on Behalf of the United States

Mrs. Charlotte Dorothy Coventry, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

My name is Charlotte Dorothy Coventry. I reside at 805 Marion Street (Seattle). I am the wife of Captain Coventry. I am acquainted with Mr. Pierce Lonergan. I had gone to see him on July 28th, 1934, that is on Saturday night. I told him I was glad to see him, as I wanted to see him about some matter. He said I wanted to see you too; he said we are just going to dinner. He was with three other people. He was with Mr. Walsh, a Mr. Bilberg, and a Mr. Gill. He said for me to come on and have dinner with them. I said I had already had dinner, but that I would go along.

After dinner, as we were leaving, I called Mr. Lonergan to one side, and said I was worried because my husband was not paid this week. Mr. Lonergan said Mr. Walsh had been very busy. He called to Mr. Walsh, and spoke to him, and Mr. Walsh handed him some money, and Mr. Lonergan came over and handed it to me. He asked the other two men who were with us and Mr. Bilberg to go [fol. 312] ahead. He said to me, "I am going to break the market wide open, and by the end of the week there will be nothing left." He made that statement on Saturday, July 28, 1934. He said he had been working on that thing for four years, and had $250,000.00 in his pocket out of it, and said Mr. Walsh and Mr. Gill had come running to him very much astonished, and he said I could have told them months ago when this was going to happen, and just what was going to happen. And then he went on and said, "What I want to see you about it this: I want to get your husband out of the office, or I will break him along with the rest of them next Monday morning. He has been working with that bunch in there, and I want him stopped." I asked him what is going to happen to the investors; they will lose their money; why it will be terrible, and he said, "What do you care what happens to them? They are just a bunch of suckers. If you lose every cent you have and went to them for help, they wouldn't help

you. Why do you care what happens to them." And then he went on and said he knew there would be a number of suits brought against him, but that he had obtained the services of several lawyers, and they would not be able to do anything in those suits, and that he was going to throw Mr. Walsh into bankruptcy Monday morning, and they were going to put him in the hands of a friendly receiver. He said my husband was not going to be implicated. He said Bill was the only one he was afraid of, and that is why he wanted him out. He said a few years ago he had come to Seattle and had lost his money, and he had hayseeds in his hair, and the money had been taken away from him, and he was going to get his own money back. All this happened when we were walking down to the office on Second Avenue. As we arrived, he said, "You go in there and get your husband now." He said, "If you [fol. 313] ever repeat a word of what is said to you, I will deny it, and my word is just as good as yours." He said some other things as we were walking along. That was the end of the conversation—just talking about this. He said Mr. Walsh and Mr. Gill didn't know what was happening. They had to do just as he said. That was practically all, and then I went into the office and told my husband.

Cross-examination:

I have known Mr. Lonergan since 1930. We took an apartment that was owned by his—or run by his mother-in-law, the St. Paul Apartments. At that time my mother, Mrs. Lyman was with us. Mrs. Lonergan's apartment was right across the hall. We became quite friendly. At that time Mr. Coventry was connected with the Arlington Garage, which my mother had an interest in, though I am not quite certain, because I know nothing about the business end of things.

We were in the St. Paul Apartments nearly a year, until about May or September, 1931. We had been in Seattle since the winter of 1929. After we moved out to Madrona, I saw Mrs. Lonergan occasionally. Sometime after we moved out to Madrona *that* we lost the interest in the Arlington Garage. I do not know whether Mr. Coventry was manager of the Arlington Garage, or owner, because it was just business, and I took no interest in it, you see.

I could not say whether my mother furnished the financial support for that business either. Mrs. Lonergan succeeded in locating a position for Mr. Coventry through Mr. Roberts, Station manager, who gave Mr. Coventry a position on the air. He was employed for several months, and was again out of work, and finally got employment through Mr. Lonergan at the office of Mr. Walsh, I believe. Mr. Lonergan made the statement that Mr. Gill did not know [fol. 314] until just recently the deals that were going on there, and they were very much surprised when it happened. He said he had $250,000.00 in his pocket. He just slapped his pocket, and said, "I got $250,000.00". (Witness slaps her thigh.)

The only thing I was interested in was Mr. Coventry's salary. He asked Mr. Walsh for the money. He did not take it out of the $250,000.00. I did not know at the time what the conversation was all about.

At that time my mother had money invested in silver futures. I was disturbed about the danger to my mother's investment. I asked Mr. Lonergan about it, on several occasions after that. I can't remember whether I asked him about it that night. I haven't a distinct recollection. I had had no previous conversation with Mr. Coventry about how the business was going. I don't remember how many times I saw Mr. Lonergan about my mother's investment. It may be two, three, or even four times. I don't think I saw Mrs. Lonergan very much in the office. I don't remember whether I saw her around the office or not. Each time I was trying to find out what was going to happen to my mother's money. He said it would be all right. He never said anything definite. My husband and I saw him once, or maybe twice, together; I think in Mr. Lonergan's own office. I think I talked to him. I don't think Mr. Coventry said anything at that time to him. He may have. He probably did. But I remember I did, myself. I told him I wanted my mother's money back, and that if he did not, I was going to do something about it.

Subsequent to that time, I went to the office of Mr. Carl Luckerath, because Mr. Walsh came out and told us that [fol. 315] Mr. Luckerath was handling the matters then. I had consulted a lawyer the Saturday night this happened. After I got through talking with Mr. Lonergan, Mr. Cov-

entry and I went out and told the lawyer just what Mr. Lonergan said to me.

I saw Mrs. Lonergan afterwards in the office of an attorney. She spoke to me about this matter.

My husband was also there. My husband had already dictated an affidavit. It had been finished. She asked me to withhold any action I was taking for a few days. I told her I could not do anything about it. She asked me if I would take her note, and I said no, it was too late, and out of my hands.

I know Mr. Roberts, and spoke to him once about this matter.

I remember a conversation with Mr. Roberts, in which I stated that I intended to get my mother's money back. I remember Mr. Roberts stating that he was a friend of Mr. Lonergan's, and he did not want to discuss it.

I don't ever remember stating to Mr. Roberts that if they didn't get my mother's money back I was going to see to it that Mr. Lonergan got into jail.

(Witness excused.)

Whereupon, the Government rests. The jury being absent, the defendant's counsel presents preliminary motion as follows:

[fol. 316] MOTION FOR AN ORDER STRIKING FROM THE RECORD CERTAIN TESTIMONY OF PROSECUTION WITNESSES

1. Pierce Lonergan respectfully moves the Court for an order striking from the record, and for an order directing the jury, to entirely disregard the testimony of all investor witnesses, relating to representations made by Norman E. Coles, or by salesmen of Norman Edward Company, for the reason and upon the ground that there is not sufficient foundation to show that such representations were expressly authorized by the defendant, or to show that such representations were made in the presence of defendant or with the knowledge and consent of defendant, nor that defendant ratified the making of such representations; and for the further reason that the testimony of the Government witness McKnight, by which the plaintiff is bound, expressly shows that the defendant Lonergan neither authorized, was present at, nor ratified such representations.

2. Defendant moves the stricking of said investor testimony upon the following ground: That if there is sufficient foundation to warrant consideration of said testimony by the jury, that said representations have not been shown by any evidence whatever to have been false, fraudulent, or made for the purpose of furthering a scheme to defraud by defendant, and for the reasons stated such testimony is irrelevant, immaterial, having no bearing on the issues involved, and having no probative value.

3. Defendant further respectfully moves the court for an order striking from the record, and for an order directing the jury to entirely disregard all testimony relating to [fol. 317] representations, statements assurances or promises made to investors dealing with or through Louis Martin & Co., for the reason and upon the grounds that there is not sufficient foundation to show that the defendant expressly authorized, consented to nor ratified any of the representations testified to, nor to show that the defendant had any control over or influence with the persons alleged to have made such representations; nor is there any evidence showing that defendant was present at any conversation between the brokers or salesmen or representatives of Louis Martin & Co. and said investors, so as to be bound by such representations; and for the further reason that the representations alleged to have been made are specifically contrary to the printed matter, rules and regulations and written data furnished by defendant Lonergan, having been heretofore received in evidence.

4. Defendant further moves the court for an order striking the aforesaid testimony, upon the ground that none of the alleged representations testified to have been by the Government shown to be false, fraudulent or made for the purpose of furthering the alleged scheme to defraud, and for that reason such testimony is irrelevant, immaterial, being wholly foreign to the issues involved herein, and having no probative value whatever.

5. The defendant further moves the court for an order striking from the record, and for an order instructing the jury, to entirely disregard the testimony of Norman E. Coles and W. G. Coventry concerning the conversations with or representations by the defendant Pierce Lonergan in any way relating to representations thereafter made by

Norman E. Coles of W. G. Coventry to investors to which either said Coventry or Coles or investors have disputed, for the reason and upon the ground that none of said conversations or representations have been shown to be un- [fol. 318] true, false, fraudulent or made by defendant for the purpose of furthering a scheme to defraud, and for reasons stated all of such testimony and evidence is irrelevant, immaterial, being wholly foreign to the issues here involved, and having no probative value whatever.

6. Defendant further moves the court for an order striking from the record, and for an order instructing the jury to entirely disregard all testimony heretofore offered and received, given by the investor witnesses, brokers, salesmen or investors, relating to the source of moneys lost in transactions with said brokers, or with transactions concerning silver futures contracts, and relating to the amount of losses sustained by investors or others through transactions in silver futures contracts, and relating to the amount of so-called margins paid to brokers, and relating to the recovery or failure to recover said margins or any of the same, for the reason and upon the ground that all of said testimony and evidence is irrelevant, immaterial, incompetent, has not sufficient foundation to bind the defendant, Pierce Lonergan, has no probative value, and was offered and introduced by the plaintiff solely for the purpose of prejudicing the jury against the defendant, and for the reason that consideration of such evidence and testimony by the jury will be so prejudicial to the defendant as to prevent him from having a fair trial, said testimony having been offered and received in error.

7. The defendant further moves the Court for an order striking from the record and instructing the jury to entirely disregard all evidence and testimony of each and every witness examined by or on behalf of the plaintiff relating to representations of any kind made by, authorized by, consented to, or ratified by the defendant, for the *for* [fol. 319] *the* reason and upon the ground that none of the representations testified to have been shown by the plaintiff to have been false, untrue, fraudulent, or made for the purpose of furthering a scheme to defraud, and for those reasons such testimony is irrelevant, immaterial, having no bearing on the issues herein, and have no probative value, and consideration thereof by the jury will be highly

prejudicial to the defendant, having been offered by the plaintiff solely for the purpose of prejudicing the jury, and the receipt of such evidence was in error for lack of proof of the falsity thereof.

8. Defendant further moves the court for an order striking the record, and an order instructing the jury to entirely disregard any and all testimony, evidence or inference of the breaking of the Seattle silver futures market or of the offering upon the Seattle Metal Exchange by defendant of 200,000 ounces of silver, or any volume thereof, or of the offering upon said Seattle silver futures market or Seattle Metal Exchange, 25,000 ounces of silver, for the reason and upon the ground that the testimony of plaintiff's witness, George Goggin, by which plaintiff is bound, expressly establishes the fact that no offering of 200,000 ounces was ever made upon the Seattle silver futures market, nor upon the Seattle Metal Exchange, and for the further reason and upon the further ground that the testimony and evidence of witness, George Goggin, establishes the fact by which the plaintiff is bound, that an offer to sell 25,000 ounces of silver or any part thereof for future delivery, made by said George Goggin, upon the 31st day of July, 1934, was made solely for the purpose of determining the price at which silver futures could be sold upon Seattle market, and for no other purpose.

9. Defendant further moves the Court for an order strik- [fol. 320] ing from the record, and for an order instructing the jury, to entirely disregard the testimony of the evidence of, or exhibits, relating to the several alleged acts of use of the United States mails for the purpose of furthering the alleged scheme to defraud, for the reason and upon the grounds that there is not sufficient foundation for the introduction and receipt of such testimony, evidence and exhibits, to establish the fact nor to bind the defendant with liability for the alleged use of the United States mails in connection with any use thereof, for the reason and upon the grounds that it appears affirmatively from the testimony of the plaintiff's witnesses heretofore adduced, that the defendant neither authorized, directed, consented to nor ratified the use of the United States mails as alleged in any of the counts of the indictment herein nor as testified to by any of the witnesses for the plaintiff herein; and for the further reason and upon the further ground that the use

of the United States mails, as in the allegations of each count of the indictment herein stated, have not shown to have been wrongful, fraudulent nor for the purpose of furthering a scheme to defraud, and that the use of the United States mails, as therein alleged, and as heretofore testified to, are for the reasons stated, irrelevant, immaterial, wholly foreign to the issues herein involved and of no probative value, and if considered by the jury herein, will constitute unfair prejudice against the defendant.

In the event the foregoing motions, or any of the same, are denied the defendant respectfully excepts to the ruling of the Court relating to such denial.

Dated this 6th day of May, 1936.

Respectfully submitted.

[fol. 321] The Court: Motion denied.

Mr. McDonald: Exception.

The Court: Exception allowed.

MOTIONS TO DISMISS, ETC.

Mr. McDonald: May it please Your Honor, I want to make a further motion on behalf of the defendant, Pierce Lonergan, and that is, that he challenges the sufficiency of the evidence and moves for a directed verdict and for dismissal of the counts of the Indictment on the ground that there has been no competent evidence which tends to establish the offense charged in any of the counts herein, and particularly move to dismiss Counts 8, 9, and 10, due to the fact that there is no indictment letters admitted in evidence.

Mr. Hughes: If the Court please, the Government consents to a dismissal of those counts.

The Court: Counts 8, 9 and 10?

Mr. Hughes: Now, just a moment, until I check. Counts 7, 9 and 10.

The Court: Number 8?

[fol. 322] Mr. Hughes: 7, 9 and 10.

Mr. McDonald: Yes, I want to amend it to 7.

The Court: That part of the motion which moves for dismissal of Counts 7, 9 and 10 granted. Counts 7, 9 and 10 and each of those Counts is dismissed only and only as to those Counts.

Mr. McDonald: Further, I want, in the event that the Court should overrule this motion, without waiving the——

The Court (interposing): Have you made the motion stated completely with respect to the challenge, and the motion for directed verdict and dismissal, as to all the Counts?

Mr. McDonald: Yes.

The Court: I am ready to rule upon that, as to the other Counts, other than those already ruled upon.

(Discussion.)

Mr. Wilkerson: I wish to urge two grounds for dismissal, the first being there isn't sufficient evidence of a scheme alleged in the indictment to warrant a conviction, and the second being that there is not sufficient evidence in the record at this time to establish that any of the letters mailed, or alleged to have been mailed, were either mailed upon the authority of Mr. Lonergan, or under his direction, or caused to be mailed by him.

(Argument.)

[fol. 323] Mr. Wilkerson: We feel that the motion of dismissal is well taken in that the Government has not proved a sufficient usage of the mails in the furtherance of any scheme that they have alleged on the part of the defendant Lonergan to warrant the case going to the jury.

The Court: The Court is ready to rule on the matter. The Court has already ruled on that part of the motion which was particularly directed to Counts 7, 9 and 10. And referring in this ruling as to those three counts, 7, 9 and 10, each of those is dismissed. As to all the other counts in the indictment, the motion is denied.

Mr. McDonald: An exception, Your Honor.

The Court: Exception allowed.

Mr. McDonald: One other motion. It has been my conviction since the first time I saw this indictment that it charges two schemes. The first charge was that they were just going to get this money and steal it. Another scheme was that they were going to rig the market. At this time I move, without waiving my first motion, which has been denied, that the Government be required to elect on which of the two schemes the defendant is to be tried.

The Court: Denied.
Mr. McDonald: Exception.
The Court: Exception allowed.

(Recess.)

(All present.)

The Court: The defendant may make his opening statement.

Whereupon the following proceedings were had, testimony taken, and evidence, oral and documentary, was introduced on behalf of the defendant Pierce Lonergan, as follows:

(Opening statement for defendant by Mr. Luckerath.)

The Court: Call your first witness.

[fol. 324] Testimony of W. T. Perkins, called as a witness on behalf of the defendant.

Direct examination:

My name is W. T. Perkins; I have lived here since '98. I am a member of the Bar of the State of Washington. I have been president of the Seattle Mining Exchange, originally the Seattle Curb Exchange. For several years I was regent of the State University and have known the defendant for five or six years. I met him in the Chamber of Commerce, in the sub-committee of the mines and mining committee at the Chamber. I was a member of the committee and vice-chairman.

Defendant's Exhibit A-22 is part of the minutes of the board of trustees of the Chamber of June 16, 1931. Exhibit A-23 is a portion of the minutes of the mines and minerals committee of the Chamber of May 7, 1931. On May 7, 1931 there was a meeting of the mining committee of the Chamber. Senator Pittman of the United States Senate was expected to arrive in Seattle on his way to the Orient, and a committee was appointed to meet Senator Pittman and arrange some entertainment before his departure. I took up with him his address on the silver question. In addition to that Mr. Lonergan was at that meeting and made an address on

the silver question and the possibility of arriving at interesting people here in the purchase of silver produced in the Northwestern mines, and exporting the same to the Orient. He was working at that time on a metal exchange to deal in the silver bullion for export purposes and he had interested the bank and others and expected to buy the silver produced in the Northwest states for exports. The report I introduced was adopted and I was appointed by the chair [fol. 325] a chairman of a sub-committee.

(Defendant's Exhibit- A-22 and A-22 received in evidence.)

The committee had several deliberations; I talked with Mr. Lonergan on several occasions. He went into it very fully with myself and other members who were interested at that time. A great deal of silver is produced in Idaho and British Columbia; it goes from here to San Francisco for shipment. Mr. Lonergan was very enthusiastic on the possibilities of a silver market here, and I found no exceptions to his ideas of establishing a silver bullion market. I have been president of local exchanges and am familiar with practices on such exchanges. There is a certain amount — what is termed on the stock exchange as street stock. The stock certificate may be for five hundred or a thousand shares, and be cut up into smaller shares and sold. And for the purpose of convenience they may have it in the name of their clerk or somebody endorse it and sign it. It was always customary to have a certificate made out in the name of a purchaser. It might be sold tomorrow to another broker and he deliver it to his customer who might keep it for a week and pass it on to another broker. It is endorsed in blank, and mine, with others might make five or six certificates— make up a lot of five hundred or one-thousand shares, and it would be carried right on under the same name until it was turned in. On the other hand if there was a one-thousand certificate and the broker sold two-hundred or five-hundred, he would have it cut up and deliver one hundred or two hundred to his purchaser and take the balance in his own name or put it under his clerk's.

(Witness excused.)

[fol. 326] Testimony of DR. HOWARD H. PRESTON, called as a witness on behalf of the defendant.

Direct examination:

My name is Howard H. Preston. I am a professor of Money and Banking at the University of Washington, since the fall of 1920. I have a Bachelor's, Master's and Doctor's degree. I met Mr. Lonergan in the autumn of 1931 after England went off the gold standard. He came to me in the early spring of 1932; he was at that time dealing in silver bullion and had a project for using silver bullion as a medium of exchange. He asked me to go over his plan and I did. I subsequently wrote an analysis of the plan, which was published in the Northwest Investor. The request for the article came from a Mr. Burson of the Northwest Investor. The article on page 5 of the Northwest Investor, issue of June 1932, an article entitled "Silver Bullion as Money" by H. H. Preston, Professor of Business Administration, University of Washington, is one of the articles I wrote. And the article on page 7 of the September issue entitled "Seattle's Possibilities as a Silver Exporting Center" by H. H. Preston, Professor of Business Administration, University of Washington, is another article I wrote.

(Defendant's Exhibits A-24 and A-25 received in evidence.)

I summarized my views in these articles which I wrote. I became interested as I studied this thing, because I discovered the tremendous amount of silver which was available flowing out of this country toward Asia through San Francisco. It occurred to me that there might be a possibility of sending that silver direct from Kellogg, Idaho [fol. 327] through Seattle to the Orient, and that we would make gains by handling that business here rather than letting it go the other way; and I learned through Mr. Lonergan because I had not then looked into this particularly, of the available smelters and refineries, investigated the situation at that end as well as this end. While there were a good many obstacles, it would be a possible thing to develop, and advantageous. There is a differential in favor of Seattle between here and the rate over San Francisco.

The map of the silver market contained in Defendant's Exhibit No. A-1 originally appeared in the commercial reports. Mr. Lonergan called it to my attention and I bor-

rowed it from him. From the interviews I had with Mr. Lonergan I felt he was entirely sincere. He had considerable information on the matter. The all-time low price in silver about December was twenty-four and a fraction; it didn't rise much until after the United States changed its monetary program in April 1933; I would say by the end of 1933 it was up to possibly forty odd cents from twenty-four. The book entitled "Risk and Risk Bearing" by Charles O. Hardy (Defendant's Exhibit No. A-26) is used and taught at the university as a text book. I have taught it at the university for a number of years. It is an authorized and standard work on this subject.

(Defendant's Exhibit No. A-26 received in evidence.)

The principles underlying both futures and insurance risk bearing are similar in the point of view of risk.

Cross-examination:

At the time I wrote the articles about silver bullion, Mr. [fol. 328] Lonergan was dealing in spot silver.

Redirect examination:

The statements I made in the articles I wrote I believe to be accurate.

(Witness excused.)

Testimony of LAWRENCE M. ARNOLD, called as a witness on behalf of the defendant.

Direct examination:

My name is Lawrence M. Arnold. I am vice-president of the First National Bank of Seattle. My particular work is in connection with the handling of the bank's investments, entailing the purchase and sale of securities for the bank's own portfolio. I buy all the bonds and investments for the bank and invest the bank's funds, running into millions of dollars a month. In a general way I have known the business relations of Mr. Lonergan with the bank; he had a commercial account there; the account was always handled satisfactorily to the bank. He also had an account in the foreign department running into a hundred to a hundred and fifty thousand Shanghai dollars. I have known Mr.

Lonergan for about three years that he practiced law in Seattle and had been acting as a broker in silver and as a member of the Seattle Metal Exchange. As far as I know his activities as a lawyer and a business man were good. During the years 1933 and 1934 the matter of establishing a silver market, and Oriental exchange market in Seattle, was discussed by us on six or seven occasions, as well as with other officers of our bank. In the discussions it was brought out that the establishment of the exchange would [fol. 329] first require the accumulation of silver bullion in Seattle. The object would be the ultimate engaging in exchange transactions with the Orient. There is no foreign exchange bank dealing exclusively in exchange in Seattle except the Yokohama Specie Bank. These discussions brought out the consideration of the international and national economic conditions which were disturbing the monetary and the banking system. Because of the upset monetary and banking conditions we concluded that the local banks would not engage on their own account on exchange transactions. It is a common practice in the City of New York and in San Francisco. I thought it was possible to obtain without any difficulty seventy-five thousand dollars credit to finance such an operation as the buying of silver bullion in one market for the purpose of selling it in forward delivery in another market. Mr. Lonergan advised me in the course of business he might have occasion to call for such a line of credit on reasonably short notice. The latter part of July 1934 he came to my office and asked if I could arrange such a line of credit. I contacted some of my associates and we had a conference with Mr. William Piggott. The letter, defendant's Exhibit No. A-21, was addressed by the bank to Mr. Piggott, and signed by me on July 24th, stating that the First National Bank of Seattle would be willing to extend a twenty-five thousand dollar unsecured line of credit to Mr. William Piggott, which he might have occasion to use in the purchase or sale of silver bullion or futures contracts in silver. The provisions and circumstances under which that letter of credit was to be used were discussed in my office among the three of us. Mr. Piggott indicated that he would use and assert that letter of credit if shown a profit [fol. 330] on the transactions, and that profit was to be two or three per cent. The conference between Mr. Piggott and Mr. Lonergan and myself was the first time that Mr. Lonergan spoke to Mr. Piggott about the proposition. It

took less than a half an hour to negotiate the deal. Mr. Piggott or myself were not confused or embarrassed by the size of the transaction at all. I considered it a practical, feasible deal, to enter into an arbitrage operation of this kind.

Cross-examination:

By an arbitrage operation I mean a transaction where you purchase in one market and sell in another, or sell in one market and buy in another. For instance, on the same date if silver is 46 on the New York market and 50 on the London market, it would be an arbitrage transaction if you bought in New York and sold in London. The letter of Mr. Piggott was not limited to the silver itself. It was being made available for the purpose of purchasing either silver bullion or contracts, or futures contracts to deliver bullion or silver. The credit was placed at Mr. Pigott's disposal. My recollection is that he didn't have occasion to use any portion of it but it was available. I was the one who had charge of the twenty-five thousand dollars letter of credit that was at the disposal of Mr. Piggott.

Redirect examination:

An arbitrage operation could take place between any two markets, for instance, it might take place between the [fol. 331] Seattle Stock market and the San Francisco Stock market, or between San Francisco and Los Angeles. It need not be between world markets.

Recross-examination:

In order to consummate an arbitrage transaction it is necessary that there be quick means of communication and that there be every possibility of taking advantage of the fact that the markets are out of line. The trading is highly specialized.

Redirect examination:

In order for an arbitrage transaction to take place two markets do not necessarily have to be out of line. If a person were in position on two markets where they had bought and sold at a time when the markets were out of line, they would arbitrage again and close out that position if the two markets came into line. In other words, it isn't necessary

that the two markets be out of line for they might close out their position when the two markets were in line, and that would be an arbitrage operation.

(Witness excused.)

[fol. 332] Testimony of GEORGE GREENWOOD, Called as a Witness on Behalf of the Defendant

GEORGE GREENWOOD, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination:

My name is George Greenwood. I am President of the Pacific National Bank of Seattle, and have been in the banking business about 30 years. My duties and functions as president of the bank are generally of an executive nature, supervision of the policies and practices of the bank.

In 1932 and 1933 I was president of the Clearing House Association of the Seattle Banks. I have known Mr. Lonergan since 1930 or 1931. He is a lawyer, carried an account in our bank. In 1931 or 1932 he became very much interested in the matter of marketing silver, and in the problem of establishing a silver market and exchange in Seattle. We discussed from time to time the possibilities and probabilities of establishing such a market. In the course of our discussions we considered the Department of Commerce's bulletin, "The Silver Market," (defendant's Exhibit A-1). We discussed the flow of silver, its production and its consumption markets, the sources of supply in the northwest, and the probability of getting an outlet for them through Seattle. Our own bank investigated through Mr. Lonergan the possibilities of handling silver, and he gave me considerable information and sources of authority on the problem, and the practicability of the location of such a market in Seattle, and in return I gave him considerable information regarding the operations of the banks, clearing house. I informed him that the functions of a clearing house was to clear the obligations of the members of the [fol. 333] association, and that balances of the members were likewise cleared every day from the association back to the members.

Mr. Lonergan's commercial account with our bank was always satisfactory. He dealt with our vault department for the storage of silver. Transactions were satisfactory from the bank's standpoint and properly carried out. The New York silver market and the Seattle silver market terminated business about the 9th day of August. I am familiar with the provisions of the Silver Purchasing Act of 1934, and believe that under the provisions of that Act, it would not be possible to conduct a silver exchange or silver market after the passage of that Act.

Cross-examination:

In my discussions with Mr. Lonergan in regard to the establishment of a metal market, they referred to both spot silver and silver future contracts, and the possibility of establishing an exchange here in this city dealing in silver future contracts, and the problem of breaking large lots of silver into small units of 500 each, for the purpose of getting small investors interested.

Our bank did not buy any future silver contracts on the Seattle Metal Exchange. I do not know anything of the mechanics of the Seattle Metal Exchange.

Redirect examination:

The banks in San Francisco and New York buy both spot and future silver.

(Witness excused.)

Testimony of B. W. Akerlund, Called as a Witness on Behalf of the Defendant

B. W. Akerlund, called as a witness on behalf of the de- [fol. 334] fendant, being first duly sworn, testified as follows:

Direct examination:

My name is B. W. Akerlund. I am manager of the Foreign Exchange Department of the National Bank of Commerce for Seattle. I have been handling foreign exchange transactions pretty close to 20 years, and handle a good deal of oriental exchange, and frequently Shanghai exchange.

Prior to the recent international monetary disturbance, the Shanghai dollar represented a certain weight of silver, called a tael. It corresponded roughly to an ounce of silver. In quoting Shanghai taels, there is an official quotation, a nominal quotation, and a mid-rate quotation. The nominal quotation is usually a rate that is often referred to as the bank's mid-rate, or the actual rate. A nominal rate is practically the same thing. They are approximately the rate at which very large transactions take place, and on the top of which the buyer or seller, the buyer usually, pays a commission. The bank's buying and selling rate may have nothing to do with that, or may be far removed. The bank's buying rate would be considerably below it, occassionally considerably closer to it, depending on the point of view he takes of the market. If he believes commodity goods exchanged or silver will go down, he may sell at a rate a good deal lower than what we might call the actual rate. When one of these three rates comes over the wire, it does not necessarily constitute a representation that business has been done at that figure. It is only an opinion. It is a matter that may change at any moment. It is not an indication that business may be done at that rate. It is an opinion.

The daily newspaper quotations for the foreign moneys of lesser importance does not mean that any business was [fol. 335] done that day at that price. It means nothing of the kind. When the quotation comes out in the daily newspapers, it is not a representation that business can be done at that price. It may mean that back of those figures that you see in the papers may lie immense transactions, or there may have been no transactions at all for a number of days.

Cross-examination:

At the present time we deal very little in futures or contracts for future delivery of Shanghai dollars. This is not a large silver market up here, and there are comparitively few transactions of that nature. Such contracts as we had, I believe we have accommodated our customers by buying for them on the San Francisco or the New York exchange, or maybe on the London exchange. There must be a connection between exchange business in Shanghai dollars with the silver markets of the world by reason of the silver contents of the Shanghai dollar.

Redirect examination:

In San Francisco and New York the banks buy and sell silver on forward contracts for their own account. They frequently take what we call a position on the market for their own account. It is possible for a bank which takes a position on a forward transaction to both buy and sell against that position before the due date of the contract. There is no question but what they would sell in order to protect themselves from holding something they had bought at a higher price. The principal silver centers of this country are San Francisco and New York. The local banks buy and sell through those banks, when occasions arise, both for cash transactions, and for forward transactions. By forward transactions I mean a contract to buy or a contract to sell at a future date.

[fol. 336] Recross-examination:

The banks seldom take delivery of bullion.

Redirect examination:

When it comes to buying or selling, everything is speculation, and everybody who is dealing in practical things is forced to take an opinion as to what will happen to the price of a certain commodity, whether it is silver, or anything else. If you are holding yourself out to do business with a customer, you have to have an opinion of what you think will happen to the market. You may be wrong or you may be right.

(Witness excused.)

Testimony of NATHAN ECKSTEIN, Called as a Witness on Behalf of the Defendant

NATHAN ECKSTEIN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination:

My name is Nathan Eckstein. I reside at 1000 - 14th Avenue North, Seattle. I have resided in this city for the past 37 or 38 years. I am president of Schwabacher Hardware

Company, a former member of the Seattle School Board for a number of years, and for the past 15 years have been a trustee of the Seattle Chamber of Commerce, and a few years ago was Vice-President. I have been the head of the Community Fund.

I have known the defendant, Mr. Lonergan for about 12 years. About three or four years ago I first discussed with him the matter of the silver market. He wanted to get me interested in establishing a silver market in Seattle, so that a stock of silver could be on hand in Seattle, so that foreign transactions in silver currency countries could be based on that stock and that market. In my opinion, if such a [fol. 337] market were established, it would be helpful to the trade here in Seattle, because the oriental countries base their currency on silver. There are enormous fluctuations in the value of silver. The buying power of oriental countries goes up or down, and the greater the buying power of the oriental countries, the greater the possibilities of our export business, and the more favorable the silver exchange for them, the easier it is for them to buy in our market.

Whenever I talked to Mr. Lonergan, silver seemed to be on his mind. He was enthusiastic on the matter, decidedly so, and sincere.

Cross-examination:

In my conversations with Mr. Lonergan we discussed dealing in silver future contracts. There is nothing illegal about dealing in futures. In my business, merchants frequently buy merchandise for future delivery. Many important merchants in my business buy commodities for future delivery and deposit margins. There is a butter and egg exchange, a wheat market and several markets that deal in futures in the City of Seattle. The merchant does not always take delivery. He may sell his contract, and that happens frequently in business practice.

(Witness excused.)

Testimony of ANNA M. HULTEN, Called as a Witness on Behalf of the Defendant

ANNA M. HULTEN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination:

My name is Anna M. Hulten. I am the vault clerk at the Seattle Pacific National Bank. I have here the original [fol. 338] cards covering deposits of silver bullion in the vaults of the bank, from approximately the month of July 1931, up through the month of August 1934. They show the name, the date deposited, withdrawal, and the amount, and have the signature on the back of the depositing part-. These cards are in my charge and control at all times and are prepared by me.

Cross-examination:

The cards record the transactions when there is a deposit in the vaults of the bank. Upon withdrawal, the person who makes the deposit must submit a safe-keeping receipt. All of the persons came into the bank in connection with their deposits in our vaults. Mr. Doneen was in the vault rooms of our bank. I have his signature on the safe-keeping receipt, and the same is true with regard to the other persons whose names appear on these cards. They must be identified at the time they sign for withdrawal. We could deliver it on their order, but only on their signature.

Redirect examination:

The deposits of silver were made in bars in various sizes or weights, all numbered. They bear the stamp of the Government as to their fineness, and each bar is numbered by the United States Government.

(Witness excused.)

Testimony of WALTER W. STOLE, Called as a Witness on Behalf of the Defendant

WALTER W. STOLE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination:

My name is Walter W. Stole. I reside in Seattle, and am [fol. 339] Secretary-Treasurer of the Alaska Pacific Mines.

Have lived in Seattle since 1899. I have known Mr. Lonergan for about 25 years. (Witness identifies the defendant, Lonergan.) He and I went to the University of Washington together. I talked with Mr. Lonergan many times subsequent and prior to the fall of 1933, regarding the establishing of a silver market here in Seattle, where silver could be sold as well as bought. He believed that a very large market for silver could be established here. There is no question of his enthusiasm and his sincerity, and I believe that he was thoroughly sound in his theory. He requested me to find institutions and persons of means in Seattle and in the northwest who were willing to buy bullion, or to buy futures in one of the larger established markets for the purpose of using that as a basis for sales in this market. I got him three customers; Dr. Maimon Samuels, a practicing physician in the City of Seattle, purchased $5,000.00 worth of silver futures in the New York market; Mrs. Meltzer, another party I interested, is a woman of means in this city; and the third customer I obtained in Easter week of 1934, while I was in San Francisco on business and arranged through the firm of George H. McKaig & Company, with the Pacific Bank of San Francisco, for the purchase of 250,000 ounces of silver. Their purpose was to offer that in this market, to sell in this market. There were several others willing to do that when called on to do it.

Cross-examination:

The arrangements with the Pacific National Bank of San Francisco for the 250,000 ounces of silver was such that they were to purchase bullion for sale in this market across the board of the Seattle Metal Exchange. The first sale by the Pacific National Bank of 100,000 ounces was in early April [fol. 340] of 1934. On the Dr. Samuels' account silver was contracted on the New York market.

The purpose of contacting these various people was to get a basis for operation in this market. Silver was held in New York by whatever purchasers were found for Mr. Lonergan, and he would trade against that silver on this market here. I was motivated by a desire to establish a market here in Seattle, and was interested in receiving a commission, if I effected those deals and Mr. Lonergan paid me a commission, aggregating a couple hundred dollars. I was familiar with their dealings in silver future

contracts on the Seattle Market Exchange. They were predicated upon silver or silver future contracts which had been purchased in other markets.

(Witness excused.)

Testimony of C. L. LAMPING, called as a witness on behalf of the Defendant

C. L. LAMPING, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination:

My name is C. L. Lamping, and I live in Seattle. I was Manager of the Portland branch of the Federal Reserve Bank, I was with the Seattle National Bank several years ago. I was manager of the Seattle office of the Reconstruction Finance Corporation until 1932. I was in that position three years. My duties with the Reconstruction Finance Corporation involved the making of loans, principally through the banks. The Reconstruction Act was to support the banking situation, which was very bad at that time, and I was in charge of the operations in this territory. It required a thorough familiarity with credit, loans, discounts, collateral and the liquidity and marketability of the differ- [fol. 341] ent types of collateral and credit.

I first met Mr. Lonergan in 1933. Mr. Stole brought me into his office on the basis that he needed someone to help in the credit end of his silver business. I think that was about the middle of 1933. We discussed the matter during the balance of that year. The idea was to have me take over the credit features of borrowing against a deposit of silver bullion, and principally in local banks. The credit would be based against silver bullion or silver. The banks were then to extend a loan against that with a certain margin of security over and above the New York quotation. The purpose was to establish a silver market in this city so that it would become a market for silver all over the world, principally Shanghai. The necessity and the desirability of having silver bullion accumulated and stored here by people who lived here was discussed. I made arrangements with an officer of the National Bank of Commerce to obtain such credit arrangements. We discussed

the terms of the margin of collateral, and the conditions upon which the credit would be made. The bank official finally stated that they would be interested in making such a loan, and the credit was ready and available at any time that we called upon it. The first transaction was on a $25,000.00 basis. As future need arose, it would be taken care of at that time. This credit was never used. The market terminated its operations before any necessity for using it.

Cross-examination:

I was to get influential persons who had money, or banking institutions interested in making loans to Mr. Lonergan for purchasing silver bullion, and depositing that silver as collateral against the loan. I made some arrangements for such transactions with some of the local banks, and the [fol. 342] silver deposited was to be traded against the silver future contracts, and when the delivery dates came due on these silver future contracts, and the buyer of a contract came in with a balance due on the contract, that that money could be taken to the depositary or bank, and deposited, and an amount of silver equal to the amount called for in the contract would be delivered to the customer, if a future holder demanded silver.

The New York quotation was taken as a basis.

I was the manager of the Seattle office of the Reconstruction Finance Corporation during the moratorium of March, 1932. I was assistant manager and afterwards was made manager. From my knowledge of the Reconstruction Finance Corporation and of its principles and the conditions they expected in making loans, I would say that they would make a loan to a bank whose assets or a portion of those assets consisted of silver future contracts. The R. F. C. would approve that kind of loan. Where a bank had gone out and invested in silver future contracts and deposited margins, it would be considered a first class risk, in my estimation. I would make a loan to such a bank that had invested in silver future contracts across the board of the Seattle Metal Exchange on margins.

Redirect examination:

The matter of the margin that would be required on the proposition submitted to the parties I interested, was a matter of adjustment between the buyer and the bank. The

bullion purchased on the outside market was not allocated to any particular contracts, for sale on this market. In other words, the contracts on this market were not set off or designated against any particular bullion or any part of the bullion that was held on the outside markets.

(Witness excused.)

[fol. 343] Testimony of JOHN PERRY BALLANTINE, called as a Witness on Behalf of the Defendant

JOHN PERRY BALLANTINE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination:

My name is John Perry Ballantine. My residence is Seattle, Washington. I am a professor of Mathematics at the University of Washington. I have the ordinary Bachelor's Degree from Harvard University, and a doctor's Degree from the University of Chicago. My Doctor's degree is in philosophy and mathematics. It is the highest degree given, except honorary degrees. I am also a member of the American Men of Science. It is a group of scientific men in America with special scientific, or special distinction for scientific work. The American Men of Science have recognized me as a specialist in matters of interpolation and statistics.

By examining the experience over a period of years in some market similar to the one in question, and then seeing the actual facts as recorded in that particular exchange, it can be determined what percentage of contracts will actually be called for delivery of silver and what percentage will be provided for by some other means. Suppose we have two possible events that will happen, that is to say, a contract may call for the delivery of silver, or it may be settled in some other way. The law of probability is the same for any such event as may come to two different ways. There is a well defined principle of mathematics underlying that law that has been worked out 3,000 years ago by eminent mathematicians. From a study of the history of some particular exchange and what has happened in the past, I could not figure out exactly what will happen,

[fol. 344] but I could figure out the probability that different events might happen. I have made a study of the probability of a demand being made upon silver for future delivery on the Seattle Metal Exchange. The experience on the silver and the wheat and cotton exchanges shows that the percentage of contracts consummating in delivery varies from month to month in a manner that nobody can predict, but it is observable that in every case it is less than 1%, or possibly equal to 1%. Taking an interval of years for which statistics are available, and the total number of contracts consummating in the actual delivery, and divide that by the total number of contracts issued, and the result is what is called the mathematical or statistical probability that any one of those contracts would be consummated in delivery.

Assuming the probability that a contract actually consummating in delivery is 1%, that does not mean that every month precisely one contract in one hundred would consummate in delivery. A broker could figure out how much silver to keep on hand to be able to meet any demand that may be made. Of course, to be absolutely sure, it would be necessary to keep on hand the total amount of silver called for by all the contracts, but business could never be operated on that basis. An insurance company could not run, if they had to figure that every insured person would die during the first year he was insured. That principle of probability is, of course, the basis of all insurance company's figuring, and a broker has a right to figure the same probability that an insurance company does, provided he does it conservatively, so that if a broker figures that the probability of a certain event happening is very minute, then he will be conservative, if he assumes [fol. 345] that it is very unlikely to happen.

Assuming 970 contracts calling for the future delivery of silver at a future date, and assuming the probability of 1%, arrived at earlier, the probability that more than 40 contracts would consummate in delivery out of 970 is very minute. It figures out decimal 12 ciphers, 149 (.000000000000149). That is the probability that precisely 40 contracts will be called for, no more, no less. But, of course, a broker cannot figure on exactly, likely. What we have to provide for is against a possibility that 40 or more will be called for, and that probability works out slightly

larger than 40 exactly. It is still decimal, 12 ciphers, 1935 (.0000000000001935). That is the probability that 40 or more contracts will be called for; 40 or more all the way up to 970. There is about one chance in five million that one of those brokers would have to deliver more than 40 contracts out of 970. If you were operating for 1,000 contract months and a thousand different firms operating, most of them would get through without any call, but the probability that one of them somewhere would be called in some month is one chance in five million. And when I say called, I mean the probability that one of them will be compelled to deliver more than 40 contracts.

I was going to figure it for 120,000 ounces, but I ran out of ciphers.

The imposition of a 50% profit tax upon a contract for future delivery, if the same were purchased for the purpose of resale at a profit, can be demonstrated. Let us say for definiteness that I enter into a large number of transactions, or make a two per cent profit ten times, and make a two per cent loss six times. Then, of course, I have a small net profit to show for my transactions, and that is about as [fol. 346] good as any business man would expect in those circumstances. Of course, I have no way of telling when silver is going up or down, but assuming I am in the business, I would have some hunch whether silver was going up or down. You see I made a profit of 20%.

Now, supposing the government says that I must pay 50% of my profits, that means that I must pay ten cents out of the twenty cents profit I made, and I still have my twelve cents loss, and quite naturally it works out to my disadvantage. And, assuming that I have been in business quite awhile, and that is how my losses and profits stacked up, the net results, I would figure the purchase of these contracts was no longer profitable, and I would naturally withdraw from the purchase of these contracts for expecting a profit.

What I have shown so far merely shows that many people who would be prospective purchasers would have withdrawn from the market. But if the price of silver was 46, and I had a chance to buy it for 44, I might be tempted to buy at 44, even if I had to give the Government half the tax when the price should finally recover to 46 again. But you see if I had bought at 44, then the next purchaser would

be in the same predicament. He would say the market is 44, and I won't buy unless I can get it at 42. The net result, I think would be the complete demoralization of the market, assuming those contracts were purchased entirely for the purpose of resale at a profit. The profit tax would cause the value of those contracts to entirely disappear.

The underlying mathematical principle that would result can be put in a formula. Assuming that I am a broker who is going to buy for the purpose of making a profit, I will [fol. 347] assume that I will be able to sell at "M", but I will not buy unless I can buy at a concession price, enough to enable me to make twice the profit I want for myself, because I must give the Government half, and also must make my costs. The cost involved is in buying and selling, of course. So, assuming a sale on the market at the price "M", then this is the figure (witness indicated) that I would feel justified in offering for purchase. This figure being arrived at and bid, and the transaction consummated, this figure (witness indicates) then constitutes the market. It is the last sale, you see. And so any other person purchasing would use this figure here in place of the value "M" that I started with. And of course, this figure is smaller than "M", assuming, of course, that I want to make a positive profit.

So the next person would have to buy at enough under, using that figure as his selling price, minus twice the profit he wishes to make, minus his costs.

This is the price that the first purchaser pays. This is the price that the second purchaser pays. It can, of course, be simplified a little bit into M minus 4P minus 2C.

The third one will pay a price which is correspondingly less, worked out by the same formula, M minus 6P minus 3C. And the purchaser in this could be an M minus 2NP minus NC. And as that increased, this figure gets smaller and smaller. This principle and this formula shows precisely that a 50% profit tax would result in the complete disappearance of market value, and the result would apply wherever that is the situation.

(Defendant's Exhibits A-28-1, A-28-2, and A-28-3, received in evidence.)

[fol. 348] Cross-examination:

The law of probability that I have testified to is based on experience, and the figure of 1% was shown to me in

some certified copies of reports on various markets, including the Chicago Board of Trade for wheat and the Seattle Silver Market. I used the largest figure that one could get in any one month (for delivery). This law of probability that I have worked out has to do with the number of times that a customer will call for delivery under a futures contract when that delivery date comes due. The value of this law of probability in connection with a market operation like this is to give the broker information as to how much silver he should carry on hand to be safe.

In considering the experience and in forming a basis in arriving at a law of probability in this matter, the human element, the way the market is operated, the way they conduct their sales, the way they trade across the floor, etc., would certainly show up in one of the tables that I examined. If there was a great deal of persuasion used by brokers or members of the Seattle Metal Exchange to obtain switching of contracts by customers, it would have shown up on one of the other exchanges during some month at some time in the past.

If I make the same computation for the results on those other exchanges, then my conclusions are fulfilled by the experience as run on those other exchanges. In other words, they never have more than 1% contracts consummated and delivered. I took the largest figure.

[fol. 349] The figures show based on past experience taken from other markets, as well as the Seattle Metal Exchange, the customers would call for the delivery of a very small portion of those contracts. From the law of probability you can not predict whether the price will go up or the price will go down.

I would consider it a safe course of procedure to establish a law of probability with regard to calls that will be made on those contracts on the Seattle Metal Exchange, provided the probability worked out to be sufficiently small.

If one is only maintaining a certain margin against delivery on those contracts, they are relying on the rule of probability in determining what the amount of silver bullion shall be held, in order to be assured of having enough. I know, but a bank does not have enough to pay every checking account.

(Witness excused.)

[fol. 350] Testimony of Mr. W. L. Cambell, Called as a Witness on Behalf of Pierce Lonergan

W. L. Campbell, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

My name is W. L. Campbell. I am resident partner in charge of the business of Dean Witter & Company. I am familiar with the practice and course of their dealings for customers in the brokerage business of that company. We fulfil customers' orders for contracts for futures delivery of commodities on different commodity exchange.

Referring to Exhibit A-29, the white card is merely a form of information card used by Dean Witter Company concerning the customers' back ground. The second card is the hypothecation, or market agreement used by Dean Witter & Company. The next, the pink slip, is the form of sales confirmation slip for commodities used by Dean Witter & Company, and the blue slip is the buy confirmation, and the white slip at the bottom is the close out of a commodity for futures contracts used by Dean Witter & Company. It is the practice to have the white card and the second card signed by the customers before transactions are negotiated for them on futures markets.

(Witness temporarily excused.)

Witness (recalled):

Referring to defendant's Exhibit A-2, signed with the name of Atwood, and appearing to be a customers card from Louis Martin & Company, I have compared that with the second portion of the Exhibit A-29, which is the Dean Witter & Company customers' card. There are a number of differences. Some of them are merely differences in wording. The following is one matter which is not on the [fol. 351] Dean Witter card. "That the broker agrees to use due diligence in forwarding the customers' orders to their destination, but will not be responsible for delays due to wire trouble, or other breakdown of transmission facilities, nor shall the broker be liable for any delay in transmission occasioned by any cause, or causes, beyond the control of the broker." That is on the Louis Martin & Company card, and not on the present Dean Witter & Company card.

Referring to No. 13, in defendant's Exhibit A-2, "Wherever the word securities is used herein, it shall be deemed to mean and include commodities and/or contracts for commodities." I would say that the Louis Martin & Company card, and the Dean Witter & Company card are substantially the same. Many of the paragraphs are identical. The card now used by Dean Witter & Company has been corrected in slight material since 1932. The Dean Witter & Company card contains additions to the Louis Martin & Company card. I have compared the buying confirmation of Louis Martin & Company and the buying form of Dean Witter & Company; the arrangement is different. The Dean Witter & Company card says: "All purchases and sales made by us for you are made in accordance with, and subject to, the rules, regulations and customs of the Board of Trade of the City of Chicago, and the rules, regulations and requirements of the Board of Directors, and all amendments that may be made thereto." There is stated in this (indicating the Louis Martin & Company card), "It is agreed between broker and customer that all transactions are subject to the rules and customs of the Seattle Metal Exchange, and its Clearing House, or rules of Exchange where order is executed."

There is a number 2 on that, under that heading on this confirmation—not on the Dean Witter & Company con- [fol. 352] firmation. It says: "That all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him, either separately or together with other securities, either for the sum due thereon or for a greater sum, or without further notice to the customer."

(Defendant's Exhibit A-29 received in evidence.)

Witness (continuing): A is the information card. B is a hypothecation agreement, or margin agreement. The verbiage of the reverse side of defendant's exhibit A-2 is compared with Exhibit B, but in the Seattle Metal Exchange, the two were combined. In Dean Witter & Company's office they were kept separate.

(Witness excused.)

Testimony of Mr. Clifford F. Gorman, Called as a Witness on Behalf of Pierce Lonergan

Clifford F. Gorman, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination:

My name is Clifford F. Gorman. I am a security broker. I was employed by E. A. Pierce & Company, members of the New York Stock Exchange for a period of three years from 1929 to 1932. I was the customers' man in charge of hiring and training of junior employees in the brokerage business and the operations of the stock market. Following that I was manager of F. M. Mohr, Inc., dealing in New York securities here in Seattle.

A year ago, I went to Juneau, and opened an office for Wilson, Fairbanks & Company. I am now a security broker [fol. 353] for myself in business in Seattle.

When I was with the A. E. Pierce & Company, we dealt both on the commodity and stock exchanges.

There are various classes of brokers. Specialists, who deal in special commodities, odd lot brokers, who deal in small lots, floor traders, that is, members of the exchange, who deal among themselves on the floor of the exchange. A specialist directs practically all his activity to a special or given commodity. An odd lot broker is one who deals in less than the unit prescribed by the exchange that he is trading on. The unit that is traded on in the exchange is known as a round lot, and a unit that is less than a round lot is either an odd lot, or a job lot. There is a differential. A customer purchasing pays more on an odd lot than customers purchasing the round lot, and the customer selling an odd lot will receive less than a customer who sells their round lot. This differential is in favor of the odd lot broker. An odd lot broker really deals for himself.

In buying an odd lot, he must also take chances on the movement of the market, either buying or selling, and his differential is for part of the risk, as well as the additional cost for handling and assembling job lots in and out of round lots.

A floor trader is a broker and member of the exchange, who deals for his own account. He has no brokerage to pay like those who might be customers. He is interested

in slight deviations of price, either on the market between two delivery months, or between the price on a given market.

When a customer comes in to a broker to arrange for the [fol. 354] taking of a futures order from the customer, he must establish his credit, sign margin agreements and signature cards, and then, if he wishes to place an order, he must put up the required margin.

The broker to whom an order is given has it executed on the floor of the exchange by another broker who has futures to sell.

The purpose of the margin required from the customer is to protect the interests of the broker, who, himself, must put up the money.

The customers negotiations and responsibilities are directly with the broker to whom he gave the order. He has nothing to do with any other broker.

The use of street names is for the purpose of breaking down round lots to odd lots or job lots.

Cross-examination:

Street names are not the names of dummies. They are the names of clerks in the offices of various brokers or corporations. If I have a certificate which is sold through a broker, then they may use my certificate as a street certificate, or they may use the certificate in your name, or the court's name. There would be cases where both buy and sell would be good brokerage practice through a street name. It would be the execution of securities or contracts that might be in any two names, whether they are the direct owner, or whether it is the security or contract held under the name which would be interpreted as being the street name. In other words, you and I might buy and sell, or a broker, we will say, is executing orders for us. And then it might be that Mr. Swenson would be making the purchase [fol. 355] and the exchange of certificates would still be in your name and my name, and we would be innocent parties, and have nothing to do about it. The way the transaction has been described is not necessarily a wash sale. Any market operator must have a short position as well as a long position in operating a market. It is considered good practice, and it is always done, for a broker on a metal exchange to take a short side of the market against investors who

have purchased contracts for future delivery of silver; it is always done, I would say, in commodity exchanges—wheat, cotton, or sugar.

(Witness excused.)

Testimony of Mr. George F. Welch, Witness Called in Behalf of Pierce Lonergan

George F. Welch, witness called on behalf of defendant, being first duly sworn, testifies as follows:

Direct examination:

My name is George F. Welch. I am a resident of Seattle. I am employed by the Railway Express Agency, and am familiar with the rates and charges for shipping silver bullion from Seattle to San Francisco in the year 1934. That rate was $4.85 per thousand dollars value, if the weight would not run over 100 pounds per thousand dollars. The first class rate is charged for additional weight.

(Witness excused.)

[fol. 356] Testimony of Henry F. Moore, Witness called on behalf of the defendant.

Direct examination:

My name is Henry F. Moore; I am a resident of Seattle; I am a certified public accountant; I have been doing accounting work for a little over thirty-five years. I spent fifteen years with the accounting department of the Pacific Coast Company and its subsidiaries, Pacific Coast Steamship Company, Pacific Coast Coal Company, Puget Sound Railroad, Columbia & *and* Pacific Coast Railroad in California and other subsidiaries. I was with Haskins & Sells, one of the largest of the American firms of accountants in the financial district of New York, working up and down the Atlantic Coast for a year. I have been in my business for myself ever since that time, in 1919.

Mr. Dennis: If the only question is about qualifications, there is no dispute.

Witness (continuing): I have known Mr. Lonergan for fifteen to twenty years. In 1933 he consulted me in connection with opening the books of the Seattle Metal Exchange and the books of brokers who would operate on that exchange. I personally set up the books of the Seattle Metal Exchange. I set up one model system for brokers' books. We did not set up a permanent set of books—we used columnar paper. The idea was to use those until the market was more thoroughly established and then go to the expense of getting a full printed form. During the last two or three years I have examined the books of the Seattle Metal Exchange and the books of several brokers in evi-[fol. 357] dence. I find the brokers' books, accounts and books of the Metal Exchange, the clearing house follow the same form that I set up initially. They follow the accounting system usually used in commodity exchanges. I have been in the courtroom for the past several days and heard the testimony of the plaintiff's witness, Mr. Roche, in connection with certain summaries taken from the books. I gathered from his testimony that there are some records missing. It is possible that he might leave out, for instance, a purchase and a sale of even amounts and still balance out on the total. I spent considerable time with Mr. Lonergan concerning the Seattle Metal Exchange and from my previous experience I believe he was very enthusiastic about it and felt the possibility for a successful market here in silver. From my experience and based upon conversations with Mr. Lonergan, his proposed method of operation was in accordance with the established and approved methods of exchange operations.

Cross-examination:

With some of the books missing there is a possibility of Mr. Roche leaving out offsetting transactions; he should have had the closing sheets and worked back through the confirmations by the brokers; he should have had the books of Jordan & Company.

(Witness excused.)

Mr. Louis J. Gill (recalled):

I was present at a good percentage of the group meetings of the associate brokers and customers' men—not all of

them, the discussions were of such a nature that I was familiar with them. They were more or less economical and I covered that at different times with Mr. Lonergan. [fol. 358] The salesmen would come back with newspaper clippings of the day, what was happening in Washington, D. C., and they would ask someone's advice, and naturally Mr. Lonergan's authority was taken. I had the complaint from him several times as to the fact that my salesmen were running to him and asking him at different times all day when he was busy, and these meetings were arranged for that purpose. Mr. Lonergan had no control whatsoever of my salesmen; these meetings covered the economics of silver—the discussion of silver as a commodity. I do not recall Mr. Lonergan ever stating at the meetings that the margins placed by customers with their brokers were put into a trust fund. My salesmen knew that there were rules and regulations of the Seattle Metal Exchange and clearing house which covered all the contracts thereon, and knew where they were and that they were available to the public at any time. I never had any lists of widows paying five thousand dollars income tax or more—paying income tax on five thousand dollars or more. There was no such list ever presented to me or to my salesmen by the defendant, Pierce Lonergan. There was an associate broker, Norman Coles, who used a list of school teachers and women. At the meetings we were never advised to use such lists, as the operation of my business was solely up to me. Customers' margin money was deposited with the broker. Mr. Lonergan stated at the meeting to all persons that the customers should look for responsibility to the broker for future delivery of silver at the Seattle Metal Exchange. At these group meetings there were salesmen from Louis Martin Company, my firm, Norman Edward Company, and at times the firm of Ray Thompson Company in Tacoma. [fol. 359] From my firm there was George Welch, Mr. A. J. Bratsburg, Robert Lonergan and George Whittle. At the meetings Mr. Lonergan discussed the similarity of trading and ways of trading in regard to this exchange and other exchanges. He did not represent that the Seattle Metal Exchange was an adjunct or part of any other world market. Mr. Lonergan's statements were repeated a number of times, because there were always new salesmen around entering various firms, and those subjects were discussed when the salesmen were present. There wasn't anything

said at those meetings by Mr. Lonergan or those in charge of those meetings from which any of those present could gather the implication that there was a trust fund for margins, or that there was any connection in the sense that the Seattle market was a part of any other world market. In handling the discretionary accounts carried in my brokerage office by Mr. Lonergan he had directed me from time to time to sell specific amounts of silver for future delivery at a fixed price of three cents above the New York quotations. That is, he would direct me to sell, say, 25,000 ounces of silver or any part thereof, at a fixed price above the New York market, and this price as a matter of practice ran from two and a quarter to three and a quarter cents above the New York market, depending generally upon the nearness to the deal and other matters that might affect the market. At these group meetings Mr. Lonergan stated that the Seattle price would run substantially three cents over the New York price, due to the expense of breaking down the 25,000 ounce lots traded in in New York to the lots traded in in Seattle. To my own knowledge all the members of the Seattle Metal Exchange were separate organizations and separate firms.

Cross-examination:

[fol. 360] On the 31st of July, 1934, I bought contracts at the request of Mr. Lonergan at the price the order stipulated. The price at which to buy was given me by Mr. Lonergan. There was never any conversation about a trust fund. The only one whom I know that had a list of women was Mr. Norman Coles, he was an associate broker. I have never seen the list of widows payin- income tax anywhere and did not use the list. The customers looked to the brokers. The only security that the customer had for putting up his money was the brokers themselves, in that sense. The orders for purchases and sales for the discretionary accounts were given me in the same capacity as any other customer and were treated the same. There was no fixed price for the sale; each sale was to be made at a specific spread or amount over the New York market as it came in over the wire; or he might put in a resting order to buy or a resting order for a sale—that is that when the market dropped to a certain point, buy it for me or sell it for me.

(Witness excused.)

Testimony of JOSEPH D. ROBERTS, called as a witness on behalf of the defendant.

Direct examination:

My name is Joseph D. Roberts; I have been living in Seattle since 1922; I am a publisher. I am a member of the State Legislature in the Session of 1933 and the Extraordinary Session. I know the defendant Pierce Lonergan, and I know Mr. Coventry and his wife. My Coventry at one time was in my employ. I recall having a conversation with Mrs. Coventry in August 1934 in which she stated that she had a claim against Mr. Lonergan on behalf of her [fol. 361] mother and that she was going to get the money or else make plenty of trouble for Mr. Lonergan and ruin him in this town, or words to that effect.

(Witness excused.)

Testimony of ADAM BEELER, called as a witness on behalf of the defendant.

Direct examination:

My name is Adam Beeler; I reside in Seattle. I am an attorney and member of the Bar for about twenty-eight years. I have served in the State Legislature three sessions; I am the author of the Beeler Anti-Narcotic Law; I have been a Superior judge of this county, appointed by the Governor and selected by the people thereafter; and then appointed by the Governor to the Supreme Bench of this State and elected by the people thereafter. I have know- the defendant Pierce Lonergan for approximately twenty-one or twenty-two years. I met him frequently in business and around the Courts, and in connection with the Prosecuting Attorney's office of this county. For a while he was concerned with matters of divorce and the welfare of children in marriages. I met him in my professional capacity as attorney like any other attorney, where you had business, we were handling one side, and he was handling the other. I know the reputation of Pierce Lonergan as to honesty, integrity and fair dealings was very good. During the period I have known Mr. Lonergan his general reputation for truth and veracity was very good; I had never heard it questioned.

Cross-examination:

I am not familiar with the activities and operations of Pierce Lonergan on the Seattle Metal Exchange from June 20, 1933 until August 9, 1934.

(Witness excused.)

[fol. 362] Testimony of ROBERT LONERGAN, called as a witness on behalf of the defendant.

Direct examination:

My name is Robert Lonergan; I am 25 years old; married and reside in Seattle. I first met Mr. Lonergan about ten years ago; have been really well acquainted with him for about six years. I have been acquainted with Louis Gill for about three years. I was a salesman and statistician for Mr. Gill, who was operating as Gill & Company. My compensation was purely a commission based on contracts which I bought and sold to customers, that amounted to two dollars per contract in round terms. I have completed two years in the University here in Seattle in the department of business economics. I learned the theory of charting statistics while I was in school; and while I was working for Mr. Gill I prepared charts and market analysis and diagrams from market reports, and wires and cables, Government bulletins and other available data. I studied the general subject of the movement of silver to acquaint myself as far as possible with every conceivable phase of it. I prepared certain charts or diagrams at the request of counsel for Mr. Lonergan in this case.

Defendant's Exhibit No. A-30 shows the Seattle silver futures for March delivery during the calendar month of December, 1933; and then of March, 1934—that is the top line. And then the bottom line shows the New York spot silver quotations for the same corresponding month. Those are the daily quotations. Those charts are A-31-a-b-c. 31-A is the one that has just been referred to; they all represent or illustrate the movement of Seattle silver futures and [fol. 363] New York silver futures from the beginning — the *the* Seattle silver futures market until its end.

Referring to Defendant's Exhibit No. A-32 it is an illustrated chart of the setup of an exchange; the member brokers, the clearing house, the corresponding brokers,

their relations to member brokers, the relations to the customer and the relation of the customer to the member brokers. I am familiar with the relation of the customers, brokers and members of the Exchange on the Seattle Metal Exchange.

Referring to Defendant's Exhibit No. A-33, it shows the movement of New York spot silver and London spot silver, and Shanghai (Yuan) dollar for the years 1931, 1932, 1933, 1934, 1935 and the first two months of 1936. The figures on the chart are monthly averages. The original figures of the London spot silver were quoted in pence and those would have to be converted into cents. I took the average trading rate for those same months and obtained those figures from the Standard Statistics and the Federal Reserve bulletin and converted the pence figures into dollars and cents. I have compared the demonstrations on my chart pertaining to prices and quotations with the figures in evidence in the trial here and they correspond. The purpose of the Seattle Metal Exchange was to facilitate purchases and sales of future contracts between brokers. The purpose of the clearing house association—it acted similarly to the clearing house in any city as far as the banks are concerned. This exchange clearing house settled the differences between brokers, and determined at the end of each day's trading what the brokers' obligations were to each other. A member broker was a member of the [fol. 364] exchange and entitled to trade on the Exchange. The customer dealt with his broker, who might be either a member or a corresponding broker. A corresponding broker had a relation to a member broker very much as a customer would have a relation to a member broker. The broker supplied their margin to the clearing house or the corresponding broker to the broker on the basis of their net position. All the customers did not pay the same margin to their brokers, nor did all the brokers pay the same margin to the clearing house, necessarily. (Witness explains defendant's Exhibit No. A-32.) Now, illustrating the difference in margin deposited by the member brokers in the clearing house. This broker deposits six cents margin, and this broker also deposits six cents. I don't have any variety here, member brokers. But down here there are corresponding brokers, for instance, this corresponding broker deposits five cents margin. That is determined, of

course, by a contract between the corresponding broker and the member broker, whatever their agreement is. This corresponding broker deposits six cents margin and this corresponding broker has only to deposit four cents margin. Now we come down to where I said customers did not all offer the same margin. Now I have illustrated various types of customers here, that is, they have different credit ratings as far as the broker is concerned. Now this customer has a very good rating and the broker does not require him to deposit any margin. However, here is another customer and this broker requires him to deposit six cents margin. Now here is one that has no credit standing as far as the corresponding broker is concerned so he has to deposit twelve cents. Here is one represented [fol. 365] as having a bank credit and he deposits no margin.

Referring to Defendant's Exhibit No. A-31-b, it is a continuation of A-31-a, and c is a continuation of A-31-b.

(Charts Nos. A-30 to 33 admitted in evidence for the purpose of illustrating the oral testimony.)

I am no relation whatsoever to Mr. Lonergan, the defendant. I had occasion to attend the meetings of brokers and customers' men about once a week; there were present, brokers and most of their employes; there were present at these meetings Mr. Coles, Mr. Coventry, Mr. Walsh, Mr. Lonergan, Mr. Gill and myself; and later Mor. Hughbanks, Mr. McKnight and Mr. Bratsburg. I first became connected with Louis Gill & Company in August 1933. The meetings did not begin until in the fall—in November. The purpose of the meetings was to acquaint everybody as much as possible with all phases of the business and particularly the economic side of it. Mr. Lonergan was not present at all of the meetings; the discussion- were conducted in any event between those that were present. Mr. Lonergan, when he was there, generally took charge, but in his absence or sometimes even when he was there, Mr. Coventry or Mr. Coles would take charge. The statements made by Mr. Lonergan with respect to the separate organizations of the exchange and clearing house is practically illustrated by Mr. Lonergan by sketches on paper; they are similar to what I drew up.

Referring to Defendant's Exhibit A-31, Mr. Lonergan referred to the complex nature of the exchange and the

clearing house operations but he never explained them in detail. He said they were rather complicated; that he really didn't feel like explaining them at all, but anybody [fol. 366] could find out by reading a book on the subject. He said in regard to the customers that they should look solely to their broker for responsibility and performance of their contract. Statements as to the purpose of the clearing house association were that it was to facilitate the debits and credits of the brokers to each other. His statements at the meetings regarding the customers' margin were that the amount was to be determined by the broker and his customer, but any time the customer had a book profit he could draw it down, and if the margin was down below the minimum required of him, he had to deposit more margin.

Mr. Lonergan stated that the price in Seattle would be approximately three cents higher than it would be in New York, because the expense of breaking up in large lots as dealt in the New York exchange and the small lots dealt in on the Seattle Exchange, the transportation, the risk and other factors relating to that, would come to an approximate price of three cents per ounce. He referred to the existing by-laws, rules and regulations of the Exchange and the clearing house. He said they were available to anyone that wanted to see them or to read, that there was nothing secret about them. Copies were in the possession of the member brokers; these were subject to amendment by the Board of Governors. Mr. Lonergan stated that the security that would be required by the brokers was flexible; it was determined from what the brokers were satisfied with and the customs of the exchange; if one broker was satisfied as to anothers credit; that would mean one thing; if he wasn't satisfied it would mean something else, and those statements were substantially the same made with respect to the relation between broker and customer. Mr. Lonergan referred to circumstances that would warrant [fol. 367] arranging bank credit. He stated at the meetings that nobody should trade in and out of the market, that is, where a customer would order his broker to buy a contract for him and then he would immediately sell it and then buy another one and sell one and buy one and sell one, just going in and out of the market continuously trying to take advantage and predicting small fluctuations in price. A

switch on a futures market occurs when a month for future delivery is no longer future; where a person would buy, say, for March delivery, and when March came around they would switch from the March contract to the next delivery month. They would put in an order to their broker to sell the March contract and to buy a further away contract, which constituted substantially just a forward movement of their position on the market. Mr. Lonergan always stated that the customers shouldn't try to stint themselves on margin; they should be in a position to buy their silver. He stated that it would take at least three to five years to build the market up to the point which he had in mind; that this local trading which was going on was merely to build up a background, just to give a foundation to ultimate business, which would be to a great extent foreign. He said that the brokers would have to be satisfied with small commissions until the business could be built up. Defendant's Exhibit No. A-1, entitled "Silver Market" was distributed to the salesmen at the meetings and at other times and was referred to in the discussions at the group meetings. London and New York market operations were discussed and considered at those groups. He said we should familiarize ourselves with the operations of those markets, particularly the description of those markets contained in that book. He advised us that the New York and [fol. 368] London markets could vary, as far as futures were concerned, three cents a day and spots could vary as much as six cents. After the passage of the fifty percent profit tax by the Federal Government, customers' accounts were difficult to obtain, and this is true of practically all of the associates and brokers of the exchange. They remarked how dead everything seemed to be. The statements of Mr. Lonergan that I have testified to were made on a number of meetings and in the presence of substantially all the persons previously named. Mr. Lonergan never stated exactly that the Seattle Silver market functioned in connection with the great silver markets of New York, London, Shanghai and Bombay; he said that they would probably remain on a parity, and the reason for that was that if the markets were not on a parity determined by certain conditions, that somebody would probably buy in the one which happened to be low and sell in the one which happened to be high, if it were profitable for him to do so.

Doing that would bring the markets back into their economic parity again, and this explanation was made at these group meetings on several occasions. Mr. Lonergan never stated in so many words that the Seattle Silver market could not break substantially below such world markets. The only representation with regard to the connection or relationship between the Seattle Silver market and the other world markets was substantially as I have just stated. The markets themselves were entirely separate organizations. At those meetings he said that all economic factors were in favor of a rise in the price of silver. As far as anybody could determine by analysis of the past, silver was going to rise. Mr. Lonergan never stated at those [fol. 369] meetings that all money paid in by investors on margin accounts was either used to purchase silver for future delivery, or was held in a clearing house fund until required in settlement of the contracts.

Cross-examination:

During the month of August 1933 I became connected with Gill & Company; I was employed by Mr. Louis Gill as a salesman. I worked for a commission plus a slight remuneration for those market letters that I got out. The chart, defendant's Exhibit A-32, I got out from my own knowledge of the operation of the Seattle Metal Exchange and information that I knew. Much of the information I obtained from a text book called "Rick and Risk-Bearing", which gives a very complete explanation of the setup of an exchange dealing in futures contracts and commodities. I have read several books on the subject. The Seattle Metal Exchange followed typical exchanges; you cannot disassociate the exchange from your brokers. You can disassociate your clearing house from the brokers because your exchange is merely made up of brokers. The exchange does no trading on the floor, nor does it obtain customers. Those functions are the functions of the member brokers. On the ordinary exchange the cost of operation is obtained from the member brokers, who all support the exchange through annual fees and a fraction of the commission.

(Witness temporarily excused—resumes the stand.)

I have continued the chart, which is Government's Exhibit No. 8, out to the ninth day of August 1934. The black

line represents the quotations on the Seattle Metal Ex-
[fol. 370] change. My employment ceased with Gill & Company in August 1934. The customers who had not been out of the market before then lost most of the margins they had up. I was familiar with the rules and regulations of the Seattle Metal Exchange and have read them. I prepared the market letters for the Seattle Metal Exchange from January 1934 to July 1934. I did not prepare plaintiff's exhibit No. 20, dated July 13, 1934 and I didn't know of it. That went out as a special matter on the regular market letter form, chances are I helped mail it. I helped supervise the mailing of it for our firm, Gill & Company.

The next portion of that exhibit is not one of my market letters. I don't know who prepared the letter dated July 19, 1934. I wrote the market letters from approximately January 1934; I prepared and supervised the mailing of some of those in the exhibit but those that you pointed out to me, two or three of them, I know I did not, and that last one I did not; it doesn't sound like my wording—I don't know.

(Witness excused—resumes the stand.)

All transactions across the floor of the exchange are reported through the clearing house and the moneys paid in by the various member brokers permeate into that clearing house. There was a Seattle clearing house in the Seattle market. The clearing house committee, I think was Mr. Walsh, Mr. Lonergan and Mr. Gill. I didn't say that the margins paid in by customers went into the clearing house—margins collected by the brokers from the customers went into the brokers' own funds. The moneys that went into
[fol. 371] the clearing house depended upon arrangements that the brokers had with each other, and that is the condition that prevails on the ordinary organized commodity exchange. Of the customers of Gill & Company, Mr. Gill received the money. The customers of Gill & Company with whom I contacted were not told of the disposition of moneys that were paid in as margins. The function of the Seattle Metal Exchange clearing youse was the same as the function of any other clearing house exchange, and that is to match the credits of the brokers one with another, and keep track of the contracts. The functions of the clearing house were rather complicated. There was no representation made to

my customers that there was a trust fund that their moneys went into, nor did I represent that there was a clearing house account or fund that was a trust fund. My statements and the testimony with respect to the operations of the Seattle Metal Exchange were obtained by the observation of transactions, statements made at the group meetings and my own personal knowledge of the subject from authorities that I have quoted.

(Witness excused.)

[fol. 372] Testimony of Mr. Emmet T. Rogers, Called as a Witness on Behalf of Pierce Lonergan, Defendant

Emmet T. Rogers, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

My name is Emmet T. Rogers. My home is 1220 Boren, Seattle. I was for fifteen years with the import and export firm of Balfour Guthrie & Company. Following that I was in the milling of glue and seed products in a corporation for myself. I am active in the production of pre-fabricated houses, Standard Unit Company, as one of the owners.

I am acquainted with the general reputation of Mr. Lonergan for honesty, integrity and fair dealing in this community for approximately fifteen years. That reputation is good. I am acquainted with the general reputation of this defendant for truth and veracity. It is good.

Cross-examination:

I do not know Mr. Lonergan's activities on the Seattle Metal Exchange from June 20, 1933 to the 15th of August, 1934. My acquaintance with that market is only as a layman reading the papers.

(Witness excused.)

Testimony of Charles P. Moriarty, Witness Called on Behalf of Pierce Lonergan, Defendant

Charles P. Moriarty, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination:

My name is Charles P. Moriarty. I live in Seattle, Washington. I am an attorney at law, and have been in the city

[fol. 373] since 1910. I have acted as Assistant United States Attorney in this court in 1922-'23. Thereafter, I was appointed by the Governor as Judge of the Superior Court of this State, and thereafter elected by the people of this county.

I am a graduate of the State University, and have been President of the Alumni Association.

I have known the defendant, Pierce Lonergan, since some time in 1914. He has been a practicing attorney. He was deputy prosecuting attorney of King County during that time. I met Mr. Lonergan both socially and professionally. I met him professionally regularly, and have had rather a close acquaintance with him. I know the general reputation of Mr. Lonergan for honesty, integrity and fair dealing in the community, and it was good. During the time I have known him, his general reputation for truth and veracity was good.

Cross-examination:

I have no knowledge of Mr. Lonergan's activities on the Seattle Metal Exchange, nor do I know anything about the Seattle Metal Exchange.

(Witness excused.)

Testimony of Mr. John J. Sullivan, Called as a Witness on Behalf of Pierce Lonergan, Defendant

John J. Sullivan, called as a witness on behalf of Defendant, being first duly sworn, testified as follows:

My name is John J. Sullivan. I live in Seattle. I am a lawyer, and a member of the Bar of this State about twenty-six years. I have known Mr. Lonergan since he was a boy. We grew up together. I was several years ahead of Mr. Lonergan at the University. I am older than he. He has [fol. 374] been engaged in the practice of law, and went into the business of selling silver commodity a few years ago. He told me what he was proposing to do in the way of establishing a silver market. I didn't question his sincerity, knowing him, as I did. I have faith in his integrity of purpose, and not knowing the ins and outs of what would be that type of business, naturally I could not talk very intelligently to him.

He came to me and asked me if I would get him some of my Chinese clients and explain what he wanted to do. From what he told me, there was no question in my mine there either as to his sincerity or his good faith, but as to the practicability of it, of course, not being versed in it, I could not give a conclusion on it. There was nothing illegal, but if the plan which he seemed to have in mind worked, it seemed that a profit could be made.

Prior to the time of his activity in silver, he was a member of the Bar in good standing. I remember he was Deputy Prosecuting Attorney of this county. I knew he was in the service during the war. I have met him in connection with the American Legion. I know he is a Major in the Reserve Corps in the United States Army. I happen to be a Major of the same rank. From my acquaintance with him, I know the general reputation Mr. Lonergan enjoyed for integrity, honesty, and fair dealing in this community. It was good. During this time, I knew his general reputation for truth and veracity. It was good.

Cross-examination:

I have no personal knowledge of any one transaction of Mr. Lonergan on the Seattle Metal Exchange. It was a gen-[fol. 375] eral plan which he presented to me. I think when he first talked with me about it, it was around three and one-half years ago.

(Witness excused.)

Testimony of Hon. Robert M. Jones, Called as a Witness on Behalf of Pierce Lonergan, Defendant

Honorable Robert M. Jones, called as a witness on behalf of Defendant, being first duly sworn, testified as follows:

My name is Robert M. Jones. I reside in Seattle. I am at this time Judge of the Superior Court in this county. Prior to that, I was an attorney. I have been a member of the Bar about twenty-nine years, and a member of the Superior bench of this county about eleven years. I know Mr. Pierce Lonergan. Have known him for some twenty years. He was admitted in the Bar and was engaged in the practice of law until recently. I recall his being a Deputy Prosecuting Attorney of this County. I have met him both profes-

sionally and socially for twenty years or more. I know the general reputation that Mr. Lonergan enjoyed in this community for honesty, integrity and fair dealing. It was good. During that time, I was acquainted with his general reputation for truth and veracity. It was good.

Cross-examination:

I was not familiar with Mr. Lonergan's operations in the Seattle Metal Exchange. I heard something about it, but was not familiar with it.

Testimony of Honorable Malcom Douglas, Called as a Witness on Behalf of Pierce Lonergan, Defendant

Honorable Malcom Douglas, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

[fol. 376] My name is Malcom Douglas. I live in Seattle. I am judge of the Superior Court of King County. Have been for nearly twelve years. Prior to that I was Prosecuting Attorney of King County for four years, and a member of the Bar of this State since 1914. I went to the University of Washington, and was a classmate of defendant Lonergan in the class of 1914. I have known him roughly twenty-five years. Prior to 1932 he was a member of the Bar of this State. I recall his being Deputy Prosecuting Attorney under the administration of Alfred Lundeen.

I have met him both professionally and socially, not frequently socially, but frequently professionally, and occasionally socially, and he has appeared before me since I have been on the bench.

I know the general reputation Mr. Lonergan has enjoyed in this community for honesty, fair dealing and integrity. It is good. Also during that time I knew his general reputation for truth and veracity. It was good.

Cross-examination:

I am not familiar with Mr. Lonergan's operations on the Seattle Metal Exchange, except what I have seen in the newspapers.

(Witness excused.)

Testimony of Dr. George Marshall, Called as a Witness on Behalf of Pierce Lonergan, Defendant

Dr. George Marshall, called as a witness on behalf of Defendant, being first duly sworn, testified as follows:

My name is Dr. George Marshall. I live at 3103 Franklin Avenue, this city. By profession I am a physician and surgeon. I have been a practicing physician for seventeen [fol. 377] years. I know the defendant, have known him for about fifteen years. I met him frequently. I know the general reputation of Pierce Lonergan for honesty, integrity and fair dealing in this community. I would say it is excellent. I am also acquainted with his general reputation in this community for truth, and veracity. It is very good.

Cross-examination:

I knew nothing of the activities of Mr. Lonergan in the Seattle Metal Exchange, other than what I have seen in the papers.

(Witness excused.)

Testimony of Mr. George Hacker, Called as a Witness on Behalf of Pierce Lonergan, Defendant

George Hacker, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination:

My name is George Hacker. I live at 1202 Highland Drive. I am manager of the Booth Fisheries Company. I have been in that business twenty-six years. I have known the defendant, Pierce Lonergan since 1930, and have met him possibly ten or twelve times since 1930. I know his general reputation for honesty, sincerity and fair dealing in this community. I have always considered him very honorable and very honest. I know his general reputation for truth and veracity. It is very good.

Cross-examination:

I do not know Mr. Lonergan's operations in the Seattle Metal Exchange, or the methods that were employed on that Exchange.

(Witness excused.)

[fol. 378] Testimony of ALFRED LUNDIN, Called as a Witness on Behalf of Pierce Lonergan, Defendant

ALFRED LUNDIN, called on behalf of defendant, being first duly sworn, testified as follows:

My name is Alfred H. Lundin. I live in Seattle. I am a lawyer. I have been a member of this Bar for twenty-nine years. Am a graduate of the University of Nebraska with degree of A. B. and L.L. B. I was elected prosecuting attorney of this county in 1914-'16. I have been twice president of the Seattle Chamber of Commerce, and a past president of the Seattle Bar Association. I have known Mr. Lonergan about twenty-two years. He has been a lawyer. While I was prosecuting attorney, he was deputy prosecuting attorney of this county. I have met him frequently, professionally rather than socially. I know his general reputation in this community for honesty, integrity and fair dealing. It is good. I know his general reputation in this community for truth and veracity. It is good.

Cross-examination:

I know nothing of Mr. Lonergan's activities on the Seattle Metal exchange, except what I have read in the papers.

(Witness excused.)

Testimony of DR. DONALD A. NICHOLSON, Called as a Witness on Behalf of Pierce Lonergan, Defendant

DR. DONALD A. NICHOLSON, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination:

Mr name is Dr. Donald A. Nicholson. I reside in Seattle. I am a physician and surgeon. Have been for about thirty-

[fol. 379] nine years. I am a graduate of the University of Minnesota in 1897, with degree of M. D. I have resided in Seattle since January, 1905.

I knew the defendant, Pierce Lonergan, when he was in the prosecuting attorney's office. Must have been ten or twelve years ago. I have had occasion to meet him in his profession as an attorney since that time, and also socially. I know his reputation for honesty, fair dealing and integrity in this community. It is good. I know his general reputation for truth and veracity in this community. It is good.

Cross-examination:

I know nothing of Mr. Lonergan's activities in Seattle Metal Exchange, nor of his method of handling the Seattle Metal Exchange.

(Witness excused.)

Testimony of W. J. Molyneux, Called as a Witness on Behalf of Pierce Lonergan, Defendant

W. J. Molyneux, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct-examination:

My name is W. J. Molyneux.

I live at 11819 Roseburg, Seattle.

I am business agent of the street car men's union. I have resided in Seattle about twenty-four years.

I have known Mr. Lonergan, the defendant, I would say eighteen years.

I have had occasion to meet him in his profession as a lawyer, and socially.

I know his reputation for honesty, fair dealing and integrity in the community. It was good.

I know his general reputation in this community for [fol. 380] truth and veracity.

Direct examination:

I recognize the distinction between reputation and character. Character is what a man is. Reputation is not always what people think it is. Reputation is what a man

does. I don't know of Mr. Lonergan's operations on the Seattle metal exchange.

(Witness excused.)

Testimony of M. H. SHINDELL, called as a witness on behalf of the defendant.

Direct examination:

My name is M. H. Shindell; I live in Seattle. I am the court reporter that has been reporting this case and I have examined my notes with reference to the witness Coventry when he was first a witness in this case.

Q. And I will ask you if on the examination of Mr. Hughes, Mr. Hughes asked him this question, and he gave this answer, referring to Plaintiff's Exhibit No. 11, the question being: "I will ask you whether or not this letter was mailed, if you know?" And he answered: "I don't know that that exact letter was mailed."?

A. Yes, sir; that is correct.

Q. I will ask you further, if on the second time he was called to the stand, in my inquiry about Plaintiff's Exhibit No. 11, if I did not ask this question: "I will ask you, when you were previously on the stand before the jury, if you did not state that you did not know whether or not this letter was mailed?", referring to Plaintiff's Exhibit No. 11, and [fol. 381] answer was "No"?

A. Yes, sir; that is correct.

Mr. McDonald: That is all.

Cross-examination.

By Mr. Hughes:

Q. Mr. Shindell, I will ask you whether on the trial of the first case, Mr. W. G. Coventry did not testify as follows:

"Q. I will ask you whether or not this letter was mailed, if you know?

A. I don't know that that exact letter was mailed.

Q. Were any letters of this identical form mailed?

A. All of them.

Q. Mailed by whom in that office?

A. Louis Martin Company.

Q. And which particular employe mailed the letters, if you know?

A. I do not know.

Q. Sent in the due course of business?

A. In due course of business.

Q. The other portion of that exhibit is what, if you know?

A. That is a special delivery stamp on the letter addressed to Mrs. Lillian J. Lyman, carrying the address of the sender as the American Bank Building, Seattle, Washington."?

A. Yes.

(Witness excused.)

[fol. 382] Testimony of Mrs. Margaret Lonergan, Called as a Witness on Behalf of Pierce Lonergan, Defendant

Mrs. Margaret Lonergan, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

My name is Margaret Lonergan. I am the wife of the defendant, Pierce Lonergan. We were married in June, 1928. I know Mr. and Mrs. Coventry—since 1930. We were quite friendly, and they lived across the hall from us in the same apartments. Later, they moved out to Madrona. Mrs. Lyman went to New York. In the winter of 1932, I called Mrs. Coventry one afternoon, and she told me they were in great distress—that Captain Coventry had lost the garage, and they were to be evicted by the sheriff that afternoon from the house they were living in. I was greatly concerned, and I immediately called my husband and asked him to see what he could do to help them. He called Mr. Ernest Skeel, who owned the house, and had the order postponed for a few days. In the meantime, I called Joseph Roberts, and told him of the Coventry's condition, and that we would have to do something immediately to help them. I suggested to Mr. Roberts that he try to get Mr. Coventry on the air, and he said he would. I told him it was an urgent case, and he would have to act immediately.

When I went out to the Coventry's home, it was a very desolate situation. Little Billie hadn't had food for several days. It was very cold, and really quite pitiful sight. Mr. Coventry was given a position through my activities on

K. P. C. B. The only employment that he has had in the city of Seattle is what I have gotten for him. I got him the position in Louis Martin & Company. About the 31st day of August, 1934, I understood that Mr. and Mrs. Coven- [fol. 383] try were in John Dore's office signing an affidavit against my husband, so I went down there, and asked to see Mr. Dore. There were present Mr. and Mrs. Coventry and myself. Captain Coventry told me in the presence of his wife, "If I receive my $500.00 owing to my father and my wife's mother, I will tell a story favorable to Mr. Lonergan, and if I don't I will testify against him, and make it plenty hot for him, and see that he is ruined in this town."

Testimony of Carl B. Luckerath, Called as a Witness on Behalf of Pierce Lonergan, Defendant

Carl B. Luckerath, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination:

By name is Carl B. Luckerath. I reside in Seattle. I am an attorney. Admitted to the Bar in this State in 1930. I graduated from the University of Washington Law School with degrees of L. L. B. and A. B., and have been practicing law in this City since 1930. Shortly after entering the practice, I had an office directly across the hall from Mr. Lonergan, and immediately adjoining Mr. McDonald's office. At that time Mr. Lonergan was practicing law. Approximately in 1931, he entered into an office adjoining his own suite, where he entered upon some investigations into silver, and at that time referred a number of matters from his office to my office to handle, of a legal nature, and afterwards I became his attorney.

I knew Mr. and Mrs. Coventry shortly after Mr. Coventry became associated with Louis Martin & Company in the Fall of 1933. My office at that time was in the Empire Building, which adjoined the American Bank Building. They are both one building. I was present in my office on [fol. 384] the 30th of August, 1934, when Mr. and Mrs. Coventry called. They came in inquiring whether I knew where Mr. Lonergan was. At that time, Mr. Coventry, in the presence of Mrs. Coventry, made this statement: "This

is the last chance that Lonergan would have to fix up his futures account, and that you had better get in touch with Lonergan in the next twenty-four hours and get him to fix it up, or otherwise, he would tell one of two stories to the authorities, depending upon whether he got his money."

Cross-examination:

My first connections with Mr. Lonergan was simply an assistant, of a sort, and after he entered into his engagements in the Seattle Metal Exchange, he resorted or referred to me frequently for some legal opinion, or to handle some matter. I knew the operations of the Seattle Metal Exchange. I have seen the rules and regulations.

(Witness excused.)

Testimony of H. A. P. MYERS, Called as a Witness on Behalf of Pierce Lonergan, Defendant

H. A. P. MYERS, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination:

My name is H. A. P. Myers. I reside at 123 Prospect (Seattle). I am a lawyer—for thirty-five years or more. I resided in Seattle since 1893. I was a member of the State legislature. Two governors of this State have appointed me to the Superior bench. I have known Mr. Lonergan, the defendant, very well since 1915 or '16. He was first connected with the Superior Court Divorce department in the prosecuting attorney's office. When he came back from the war, we had adjoining offices, a common stenog- [fol. 385] rapher and a common entrance at 1160 Empire Building. I have been there for twenty-five years in the same building, with offices next to Mr. McDonald. Mr. Lonergan and I occupied practically the same suite. We continued in that relationship from about 1918 to 1932. He was actively engaged in the practice of law. He had a good business, and made money. About 1931 or 1932, he became interested in this silver matter. Pierce talked to me a number of times about it, before he left the office. There was no doubt about his sincerity, and good intentions, and I have

no doubt about it now. During this period I saw him every day, except when he was out of town.

I know his reputation for honesty, integrity and fair dealing during that time. It was as good as excellent. I know his general reputation for truth, and veracity in this community. It is good.

Cross-examination:

I did not know anything of his operations in the silver futures market. He talked to me about it a little before he left the office. Of course, I saw in the papers once in a while about it.

(Witness excused.)

[fol. 386] Testimony of PIERCE LONERGAN, Called as a Witness on Behalf of the Defendant

PIERCE LONERGAN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination:

My name is Pierce Lonergan. I am the defendant in this case. I graduated from the University of Washington Law School in 1914. I was born in Boston, Massachusetts. I have lived in Seattle since 1909. I am a member of the bar of the State of Washington, also a member of the bar of the State of California, and admitted to practice before the Supreme Court of the United States. I have been a practicing attorney in the City of Seattle since 1914, except occasional practice in the other jurisdictions. During all of this time I have maintained offices in the American Bank Building or the Empire Building, except for two years when I was in the Prosecuting Attorney's office in 1916 and 1917.

I became interested in the subject of silver in 1930. At that time I was practicing law; my practice was civil practice, handling mainly commercial and corporation law. My interest was aroused in silver through a study of the economic conditions after the crash of 1929. The economic conditions prevailing at that time, and the fact that there was such a cataclysm going on in the commercial, industrial and financial and monetary structures convinced me there

was something generally wrong, and I became interested in trying to find out how it could be that everybody was wrong.

I had an opportunity in 1927 when in Chicago to confer with several prominent bankers and brokers of that city, and was told then that we would have the greatest depression and panic that the world had ever seen. It came in [fol. 387] 1929, and in 1930 I began to wonder how those fellows in Chicago could figure it out, and I wanted to find out how they figured it out, and I started to work on the problem. I was practicing law at the time, and at first became interested in it as a hobby and general side line of reading. As I pursued the subject, I saw there were certain principles at work. I made greater and greater research work on it. I sent to London, to Geneva and to Washington, D. C., and to other places to get the official and authentic reports. I found that there was a decided condition or influence prevailing long before we saw the crash, and that it had been figured out by world leaders and monetary leaders, and that the men in Chicago knew what they were talking about in 1927, and that international leaders knew about it in 1925. I figured that if they knew that early there were definite principles at work, and I got their reports and their information. I gradually boiled it down to a practical local application. It was with that in mind that I was studying. By 1931 I had a pretty good idea in my mind, at least, as to where and what values were.

The Congressional Record of 1896, Special Session of Congress, probably made the greatest impression upon me. It is the most voluminous, detailed and authentic compilation of authorities that one could hope to find anywhere, speaking on the subject of economic conditions, the monetary principle that underlies the operation of commerce, industry, government, finance, and the discussion of gold and silver stores of value as the reserve, of monetary policies, the reasons for it, the price structures, commodity structures, market structures, including the history of depressions from the beginning of time, particularly and in detail the history of the depressions of this country. The [fol. 388] change in monetary policies, the reasons for them.

In addition to this reading, which is an exhaustive work I received the reports of the Genoa Conference, which was

the international monetary conference of 1925, which is an exhaustive study, and research of the results of the world war. The fact was accounced then formally, and the report has since been hushed up very generally, that there was not enough gold and silver in the world to finance the commercial and industrial activities of the nations, because of the tremendous obligations that were outstanding.

The report of the Gold Delegation in Geneva, issued in 1929, after the committee had been in session for two years, following the Genoa Conference. This Committee likewise reviews the economic monetary situation of the world. That report followed out the Genoa report, and a later and most outstanding report is the McMillan Committee report filed with the British House of Parliament. These reports state in no uncertain terms the statistics and the facts upon which they make their representations to their governments and to the nations to which they are reporting. These reports do not advance theories, they make factual statistical presentation of what they are reporting to their governments. I proceeded to read very broadly and very generally the different authorities that came out and were published. The works of Professor Castle and Keens, and our own Mr. Babson, and others. I read them exhaustively and extensively, as well as most of the American authorities.

The conclusion of my research was that we were having a rewriting of world value, and restandardization of the monetary —dit system, and at the conclusion of my research I [fol. 389] was convinced that we are at the bottom of it just as certainly as we are here. The authorities agree that there was a starting on a new era, of the economic, industrial, commercial, monetary and credit system. The impressive fact is the conclusive showing that the ultimate reserves of value are gold and silver bullion. There are other reserves of value, depending upon their permanency of form, compactness and availability for market, but the principal reserve that goes through the depressions, and upon which the world has to base its commercial, industrial and credit system is gold and silver bullion.

The conclusions that I arrived at were not my own, they were the conclusions of these men. I followed the opinions and the conclusions of these men, and they are indisputable.

From the reports I found that we were right in the heart of a situation here in the northwest that no one seemed to

know about. We had these reserves here available, I mean the sources of them. We were the next door neighbors of the consumers across the Pacific, and the future of the northwest, in the opinion of many of our leaders from several business generations, is that the Pacific Coast was to thrive upon our commerce with the Orient. Here we had the money of the Orient, we had the desire for the trade, we had the accessibility to them, we had the time advantage. The whole thing is in our favor here in the northwest, if we could have used it.

At first I had no experience in the matter. First, I thought like so many people think that our local banks, foreign exchange departments, handle foreign exchange. I found they didn't. I found there were many handicaps and limitations upon them. These studies show that we had two centers known in foreign banking as offset points. [fol. 390] They are San Francisco and New York. San Francisco, of course, was the most available place to have made a practical study of it. Whenever I could get away from business, or spend a few dollars, I went down there. I associated with the brokers and with the exchange banks, spent time with them, and had particularly favorable entree through the Bank of America. I spent weeks and days with these men, getting the practical side of the problem. It took me probably most of 1931. I went into exhaustive details so far as to follow the shipments and see the stuff laid out on the docks in San Francisco. I actually went down to see the handling of it. When I came back up here I became well acquainted with the head of the Hecla Mining Company, Mr. James McCarthy, one of the biggest silver producers in America. Mr. McCarthy gave me concrete insight into the practical problems of the production of metal generally and of silver in particular, and the set-up that exists in this country in the control of the metal markets. I even went so far as to go down into the mines. I wanted it all the way through. I got it too, and I think I know. I was convinced that something could be done.

The fact that people did not know about it was no obstacle to accomplish a program, it only requires more effort and more time, and I determined it was something worth while doing. I had two offices in my suite and I got a third. If this program was going to be carried out some time, I

wanted to hold the identification or association of ideas with what was going on in New York and in San Francisco. The only metal market in the country at that time was the National Metal Exchange, which was known in the metal markets and the gold and silver markets of the world. I incorporated the Seattle Metal Exchange, and filed the name. Simultaneously I filed in San Francisco the cor- [fol. 391] poration as the San Francisco Metal Exchange, just to file it and hold that name. In 1931 I got the office next to my suite. Times were getting pretty tough. The people were beginning to see the crack up of the monetary, credit and banking structures. The tendency of all countries is that when those conditions develop, people immediately go out and reach for the substantial form in which to hoard or save. It looked as though that was the time, or might be the time in which to get or concentrate or crystallize the attention of people to the condition that I had discovered. The office was opened up. There was a lot of hard work done on it. I read and talked and spoke on the radio, but there was a total lack of understanding, even of what silver was. It was a pretty discouraging reaction.

The trouble with the whole thing is defining terms. Manipulation is a broad term. A manipulation is nothing more or less in its broad scale but the accumulation of the thing and then the distribution of it. Manipulation has a legitimate purpose, and most usually is done legitimately. Now, of course, the only way you can get an opinion on a market is where buyers and sellers meet. The opinion of anybody about any particular thing is individual. The only way you can compare that, or know whether the opinion has any valid foundation is to have somebody else's opinion as to whether they will buy or sell. Then buyers and sellers meet.

There was no manipulation in the wrong sense, and it is not true in this indictment that the Seattle Market would be and was governed by manipulation. If you have no buyer and you have no seller, you have no market. Now, we have gone along in this case talking about a market after July [fol. 392] 27th, and the fact is there was no market. There could not be any manipulation because you had no bidders. Now, in this illustration I think it can be demonstrated beyond doubt that there was no manipulation after July 27th.

It was generally understood and stated that the cost of distributing silver in small lots in Seattle would be about three cents an ounce over the larger lots in New York or outside. Before the New York futures market opened, you could not buy silver in this country for exchange purposes under 50,000 ounce units. For industrial purposes you could buy any amount at all, 100 or 200 ounces, but you would pay six, seven or ten cents over the round lot, or large lot. The futures market in New York put on a 25,000 ounce contract that made it possible to buy in that market by taking delivery in the delivery month.

We opened the market in June 1933, and put on the first delivery for September. From that time on you could begin to work out and determine what the unit cost would be. In a new market just getting started the cost is high. On this market delivery was tendered every delivery month to everybody who wanted it.

The evidence introduced here will show that the New York market had been handling anywhere from fifteen to sixteen million ounces a day, had dried up due to the passage of legislation in June so that at times that market was only handling a half million ounces which, of course, is ridiculous on an international market. The legislation came along in June. There were at least 28 bills before Congress, and different bills before the Committee. The Silver Purchasing Act was put through at 2:00 A. M. on amendments sent from the Treasury Department, while the coinage, weights and measures committee had their proposed bill up for action. This Silver Purchasing Act was put through just like the Sherman Purchasing Act was put [fol. 393] through one of the other administrations. It was slipped through overnight, and nobody knew what to do. Because it could not provide and did not provide for all exigencies which might come up, a provision was put in the Act whereby the Treasury was to have the right to set up such rules and regulations for the effecting of this law, as the Treasury should provide. It was two weeks before we got hold of a copy of the law. It was another two or three weeks before we got the rules and regulations of the Treasury Department. In the meantime nobody in the world seemed to know what was going to happen to silver, or what had happened to silver.

The records will show no sales were made at that price (Witness indicates price 41 and a fraction). No sales or

purchases were consummated. The contracts were offered by the brokers, they were bid in by me on the account of Mr. Piggott. The deal was never closed, because these offers had no guarantee back of them that could be given to Mr. Piggott. The situation was a liquidation of the market, not a manipulation of the market. Under the terms of the futures contract at any time when the condition became obvious, the seller, or the party to the other side of the contract, could call for sufficient margin to secure the performance. That was done. The "break" of the market had nothing to do with the sending up of the margin.

At no time in the existence of the Seattle Market was there any raising of the price beyond that three cents spread, as the charts show, and never was manipulation used to move the Seattle market beyond the three cent spread. The Seattle Metal Exchange was organized and incorporated in 1931. It went into active operation, formed the futures market in March of 1933. It was the expres- [fol. 394] sion of the program to establish an organized silver market in Seattle for the purpose of accumulating bullion here using the base of that silver reserve to carry out foreign exchange or oriental exchange transactions, which transactions would be for the purpose of serving industry and commerce in Seattle. There is no foreign exchange bank American controlled or owned in the northwest. The purpose of organizing it in 1931 was to hold the name. The silver market of New York was known as the National Metal Exchange.

Louis Martin Company was organized in March or April of 1932. It was an effort by Ed Whelan and myself to distribute silver bullion for the purpose of accumulation in the community, and the additional effort to use the bullion for the basis of issuing certificates between wholesalers and retailers, which plan had been submitted to Professor Preston at the University, and which he approved as basically sound. This effort lasted from March of 1932 until the fall. It was then abandoned and closed up, nothing further being done on it.

Defendant's Exhibit A-34 is a file composed of the different speeches and articles that I wrote on the subject, and in which I have been quoted, showing my discussions before commercial clubs, community clubs, publications of mine in the Journal of Commerce in April of 1932, discus-

sions before the Tacoma Chamber of Commerce in November 1931, and another before the Mining Club of Tacoma in March 1930, and again in 1932, and a discussion before the Engineers of the Northwest Mining Association in Spokane on March 17, 1932, and again before the Northwest Mining Association in Spokane in July 1931.

This is a letter from Francis Brownell of the Chase National Bank, commending my article on silver (witness in-[fol. 395] dicates). Defendant's Exhibit A-33 is an article I got out in 1931, in which I reviewed the statistics on the supply and demand of silver.

(Defendant's Exhibits Nos. A-34 and A-35 received in evidence.)

These articles and the work along that line was necessary by reason of the propaganda and the public impression that there was a plentitude of silver and it was a drug on the market. The articles were to show that there was not at this time.

Defendant's Exhibit A-37-B is a chart which illustrates the statistics I have referred to, and comparing the purchasing power of silver. A-37-C is one showing the purchasing power of the American dollar in relation to commodities. A-37-D is one showing the world's production, the world's coinage and industrial use of silver between the years 1921 to 1930. I prepared them personally. They were quite generally used throughout the northwest after I produced them, and had a wide distribution. Exhibit A-36 is a series of articles that I wrote. A-36-A is an address I made August 22, 1933. Exhibits A-34 to A-36 are just odds and ends that I picked up. I do not know where my files are.

(Defendant's Exhibits A-36 and A-37 received in evidence.)

(Witness explains the charts) Defendant's Exhibit A-37 shows that the purchasing power of silver is relatively constant between 1911 to 1932, although we came through a war period, two periods of depression and resession. Exhibit A-37-B shows that despite the fact that the price of silver changes, the production does not, one of the controlling factors in making it a stable form of reserve, or long term investment. Chart A-37-D shows a gradual shortage of the supply of silver, as set out in the statistics.

In June 1933, Mr. Gill, Mr. Walsh and Mr. Goggin and [fol. 396] myself became associates in the Seattle silver market. The plan was to build up the local market, take in gradually, as the business would expand, more members. That Mr. Goggin would give up his law business, come up here and take charge of the larger accounts, and that he would take charge of the foreign accounts, when and if the market built up to that stage. Mr. Walsh took over the Louis Martin Company, which had received quite a bit of publicity and comment in the effort of 1932, to sell silver bullion. The corporation was dead, but the name had a certain value. Mr. Walsh took that over because of his prominence as a banker. He took over that company and operated it as a brokerage company, under his personal membership on the exchange. I had no contact at all with the public. My office was over in the Empire Building. Later on I took an office in the American Bank Building.

Defendant's Exhibit A-38 is a letter under date of July 14, providing for the transfer of Louis Martin Company to Walsh. Defendant's A-39, is a copy of the rules and regulations of the Seattle Metal Exchange, on November 14, 1933, a resolution authorizing the establishing of a clearing house as a separate entity under December 11, 1933. An amendment of June 17 of 1931 of the Seattle Metal Exchange. The by-laws of the exchange. The rules of the exchange, and then the rules and regulations of the clearing house. It is a true and correct copy of the papers it purports to be as of April 13, 1934. There were some slight amendments made subsequently.

The instructions regarding the change of interest in Louis Martin Company to John R. Walsh and his wife was carried out by a meeting duly called, and I transferred the stock to them. Before that time John R. Walsh had actually been conducting the business of Louis Martin since the beginning of business, June 12th or 15th, 1933.

[fol. 397] The rules and regulations in Defendant's Exhibit A-39 of the Exchange and the Clearing House, are the rules and regulations under which the business was conducted.

(Defendant's Exhibits A-39 and A-40 received in evidence.)

A silver market is merely a market where buyers and sellers meet. A commodity exchange is merely an associa-

tion where the members deal in a commodity. It is the organization of a market that would otherwise be under independent activities of men trying to meet and find business wherever they could. An exchange organizes that so that they meet all at one place at one time, subject to certain agreed regulations and rules. The rules and regulations are merely the laws of the association or exchange, governing the conduct of the members of that association in the operation of the business insofar as it affects the exchange. It outlines the policies and the laws under which that business and activity shall be regulated.

The source of the rules and regulations of the Seattle Metal Exchange was the National Metal Exchange of New York, also the clearing house. I obtained them in February of 1931, and had them copied. They were held in abeyance and never used until the Seattle Metal Exchange organized the association of brokers in 1933. The distinctive thing about an exchange is that it is an autonomous organization. I mean by that it establishes its own rules and enforces them. The rights and privileges, the privileges and the obligations of the members are enforced by the exchange, in distinction to, say a partnership or corporation. In the case of an exchange, they provide the methods by which they [fol. 398] shall discipline the members for breaches of the rules, and the terms and conditions and a complete outline of the policy and system and method under which any member must operate if he wishes to remain a member of the exchange. The purpose of that is to be so complete in detail that the members when transacting business with each other can do it very informally and very expeditiously by merely referring to the fact that their agreement and their contract is made subject to the rules and regulations, and that makes their specific or particular contract as complete and as comprehensive as though the rules themselves were included in the particular contract. By that method a great efficiency and expediency is obtained, and the transactions then executed quickly and informally, and later on come through the channels and through the different steps provided by the exchange, that is, through all exchanges, security exchanges and commodity exchanges. It is also true of futures markets as well as spot markets when the members are trading.

This exhibit also includes the rules and regulations of the clearing house. Many exchanges operate without a clearing

house. Generally in such cases those contracts are called forward contracts, executory contracts for a future performance, as distinguished from a futures contract, which is also a forward contract, but is cleared or assigned through a clearing house, which is generally a separate entity. Some exchanges have clearing houses, some do not. Some exchanges use the clearing house of another exchange. The Vancouver Grain Exchange has no clearing house. The Seattle Curb as it operated in 1930 to 1935, used the clearing house of the Seattle Grain Exchange. The clearing house is merely a facility adjunct or adjacent to an exchange for the purpose of facilitating the exchange credits and debits under contract obligations between the members [fol. 399] of the exchanges. The rules go into a great deal of detail, even for the four member brokers of the London Exchange, or the five or six who were specializing in the New York market, or the four or five who were specializing in this market. The rules are exhaustive and complete, although many of them are not applicable to the ordinary transaction of business. However, they must be in there in order to provide against the extraordinary events that may come up in business.

Memberships on exchanges throughout the country cannot be generally bought and sold as stock is in a corporation. Before a member can sell a membership, the application, the right to purchase a membership must first be passed upon by the other members. If his application to become a member is accepted by the membership committee and then approved by the Board of Governors, then that person may go out and buy a membership from someone else who has it. These are common provisions.

In all of these particulars, the general provisions and general laws, of the Seattle Metal Exchange were identical with the basic laws of other commodity exchanges in the country.

Arbitration committees, boards of appeal and the board of governors are provided for by the rules to settle and adjust disputes, if the members cannot get together and agree. There is a special committee on all exchanges to regulate the issuance of quotations. The quotations come off the floor, and are the private property of that exchange. No one has a right to them. They are issued under such

terms and such restrictions as the exchange desires to have them issued. The Chicago Board of Trade has a contract with an outside corporation that in turn sells that service to various brokers, grain merchants, etc., who are interested [fol. 400] in it. These quotations may be either as to actual transactions, merely nominal transactions, or they may be quotations that may be merely official quotations. The nominal quotations indicate that there was no trading at that figure. The official quotation is analogous to the mid-rate quotations of foreign exchange banks. It is merely an opinion that business can be done somewhere within that range. There is no representation that any volume of business is done. The official price (quotation) is generally used when you do not publish the volume or the amount of the transactions. No volume or amount of transactions were published on the Seattle Metal Exchange. The quotations that went out were merely official quotations, or an opinion that the approximate price at which business might be done, and no representation that business had been done at that price.

We have on our exchange here the committee on silver. That committee from time to time reports and recommends to the Board of Governors such changes and additions to by-laws and rules regulating trading in silver as it may consider necessary or desirable. It is the duty of this committee to file with the Board of Governors a list of banks or storage vaults, and provide such rules and regulations for the guidance thereof as it may deem necessary to govern the storage of silver, deliverable under the rules and regulations of the exchange, and upon approval of the Board of Governors, they shall have the same effect as though they were part of these by-laws.

On the commodity exchange in New York they have a committee on silk, a committee on rubber, a committee on silver, and so they have a committee assigned on each commodity that they trade in.

Section 29 (referring to rules and regulations of the Seattle Metal Exchange) have a clearing house committee [fol. 401] for the purpose of establishing liaison or contact with the clearing house. The clearing house being a separate organization, this clearing house committee recommends such rules and regulations as shall control the members in their dealings and in their transactions with the

clearing house, and in turn, the clearing house suggests such rules and regulations as it wishes, or the terms under which it will accept the clearances of the brokers of the exchange.

Then you have Section 31, providing, "No contract for the future delivery shall be recognized, acknowledged or enforced by the Exchange, or any Committee or Officer thereof, unless both parties thereto shall be members of the Exchange provided, however, that members may offer their contracts for clearance to Official Clearing Agency or Association, to-wit: The Clearing House Committee, operating in conjunction with the Exchange, which Clearing House Agency or Committee, may become by substitution a party thereto in place of a member, and thereupon such obligations thereof and entitled to all the rights and privileges of a member in holding, fulfilling, or disposing thereof."

The rules provide a standard form of contract in any futures market, and is set up specifically in the rules. However, the formal contract is informally executed, prior to formal execution, by what is known as a contract slip. It is merely a memorandum signed by the member brokers, which they initial, and pass to each other, and ultimately to the clearing house. The formal contract follows later. In addition there is a set of rules established for the way the members shall deport themselves in the transaction of their business, and their business with each other in the exchange, the hours at which they shall meet, how they shall make their offers to buy and sell, the trading limitation. "Trades [fol. 402] for future delivery of silver in any month shall not, during any one day, be made at prices varying more than three cents per troy ounce below the lowest price of the closing range of such month of the preceding business session of the Exchange, nor more than three cents per troy ounce above the highest price of the closing range of such month of the preceding business session of the Exchange, nor more than three cents per troy ounce in any business session of the Exchange."

The rules provide the manner in which transferable notices issue. That has to do with the time when delivery dates come. The seller issues the notice to the buyer and 36 hours are provided before he [redacted] to make delivery. The seller notifies the buying broker that at such a time he will tender to him on account of certain contracts, identifying

them, a certain specified amount of silver, as set out in that contract.

The rules provide the security required, that both parties to the contract may demand at the time of such contract or subsequently, 10% based on the contract price to be deposited and kept good, based on the market value until the contract has been carried out. Margins so called must be deposited within one banking hour, after they are called for, and the type or receipt that shall be issued by the clearing house provides the method for calling for additional security and margins. These rules, of course, apply only to member brokers. The rules and regulations of the clearing house provide the way in which the members shall offer their sales to the clearing house, and the manner in which the clearing house shall accept and control those orders, the transfer and clearance of it is set up all in detail. [fol. 403] The way contract differences shall be figured, the credit that shall be allowed for advancing market price, and the way withdrawals shall be made, in complete detail, including the setting up of the guaranty fund separate and apart from any other fund, so that if any one member fails to perform his contract, that fund shall be available.

The rules provide for the way the members shall deport themselves, and with great particularity about what is known as ring settlements or direct settlements through the clearing house. The rules and regulations of the clearing house are created by the members of the clearing house themselves, as distinct from the members of the Exchange. The clearing house, of course, does not accept anything from an exchange member unless it wishes. In the New York Stock Exchange there are four separate clearing houses, they are distinct corporations.

Defendant's Exhibit A-4 is the signature card or marginal account agreement between customer and broker. It is common to all the markets out here in the west. These cards and these forms were obtained from Russell Miller, and merely copied with the new name put in. Exhibit B is the form of confirmation, C is known as the order form that the customer signs to his broker, directing his broker to either buy or sell. D is a form of pit card. It is merely the memorandum made by the broker on the floor when he has transacted business with another broker. E is the contract slip signed by the brokers. F is a duplicate of

that. G is the triplicate of that. G-2 is known as the Trade Sheet. H is known as the Closing Sheet. I is the statement of account of the customers. J is a duplicate of that statement form. All these forms were used by member brokers and correspondent brokers who were trading on the Exchange. The Exchange itself had no forms, technically speaking.

[fol. 404] (Defendant's Exhibit A-4, parts A to J received in evidence.)

These Exhibits are merely typical forms of the brokers and correspondent brokers. Each of the brokerage offices used them independently in their own case. The significance of the marginal card is the agreement of the customer that he is making his deal, going into his contract for the purpose of buying, or if he is selling, for the purpose of actually selling. It goes into great detail as to the responsibilities between broker and customer. Another important feature is the sixth paragraph which provides that whenever the broker deems it necessary for the protection of the broker, the broker may sell all or any securities or any property which may be in the possession of the broker.

Paragraph thirteen defines securities as including commodities and/or contracts for commodities, and paragraph six that the broker may at any time close out the account of the customer in whole or in part, and may make such sale or purchase, or close said account in whole or in part according to the judgment of the broker, and in such manner as the broker may determine, either on the Exchange or at public auction, or at private sale, without advertising the same, and without notice to the customer, and without a prior tender demand or call of any kind upon the customer. However, should the broker make any tender, demand or call of any kind or give notice of the time or place of any sale or purchase the action of the broker in that behalf shall not waive or impair any right of the broker to buy or sell at any time, as herein provided. That is a common provision in every brokerage office in the country.

Paragraph eight is another important paragraph, which provides that all securities and collateral deposited for the protection of the customer's marginal account may be shipped to Seattle or any other place, and may be held there [fol. 405] and used by the broker until the customer shall

become entitled to redelivery thereof. The broker shall have a reasonable time after demand for delivery to ship securities or collateral from Seattle or from any other place where they may be, to the place where the same are to be redelivered to the customer, and shall only be required to redeliver securities of the same kind and character as originally deposited. This provision is synonymous to the collateral agreement required by a bank on a loan, and is used by all brokers.

Now the confirmation, which is "B" here (witness indicates) is a form which is sent out to a customer to advise him that the order which had previously been given had been executed by the broker, and that the broker was going to hold the customer responsible for that contract which the broker incurred.

The order, which is C here, (witness indicates) merely states that subject to the rules and regulations of the Exchange and any amendments that may be made thereto, to buy or sell a certain amount of silver for certain delivery at a certain price. The customer puts in his own price. It does not make any difference what the market is. If the broker can execute that, he does. The customer signs it.

The pit card is merely a record used by the brokers when they meet on the exchange floor, and is used by a broker as a little memorandum card until he can get back to his office and notify his office of these transactions that he has made with the other brokers during the meeting hours at the exchange. It is used on the exchange floor. When he reports what is on his pit card to his clerical force, they make up for him a contract, known as a contract slip in duplicate and triplicate. That is sent to the other broker on the other side of the deal. That broker signs the original [fol. 406] and the triplicate, and keeps the duplicate for himself. The initial broker then takes his triplicate to his clearing house, if he is using the clearing house, and it is filed.

The same process and the same steps are taken by the broker on the other side of the deal. He has a set of forms gotten up. He presents them to the first broker, who signs the original. And the net result is that the clearing house has a triplicate copy from each side of the deal, presented by the respective brokers. The brokers have an original

signed by one another, and each has a duplicate of the others forms.

Now G is a Trade Sheet. It is made up from those contract slips, a summary of each of the slips. On the sold sheet is listed all of the contracts which the member broker has sold, and there is another sheet for the buy contracts, which is an accumulation of the respective buyers' transactions. There is an alternative sheet missing out of this group G, representing the buy, or sales, from the buy and sell sheets, and is made up by the broker's office, and is known as the closing sheet. This is really a little bookkeeping system all of its own. It shows on it in proper form, and through a series of segregations the broker's transactions as shown by his books previously sent to the clearing house. It is a summary of his previous business and his position with the clearing house. Under that he lists his summary of his trade sheets. The total of his previous transactions and his day's transactions are summarized, in his net open position with the clearing house. His settlement with the clearing house as made of the previous day, the closing price with the fixed price of the previous day. Opposite that is put today's price, and by extending the two [fol. 407] columns it is determined whether he has a credit or a debit. If the market is down, he would show a debit as against the previous position. He would put up and be credited or debited with the amount that he would be bound to put up as against his previous day's contract difference and today's price, all of which is summarized. Until you have that summarization, there is no way of determining how much that is, or how much of that is credit or book profit.

This Exhibit I is just the ordinary from of a monthly statement that would be sent out to a customer, showing his position on the books of the respective broker, and J is merely a duplicate of that, which the broker keeps in his own records.

In the matter of defining terms, a spot transaction is a cash transaction in which there is a passing of the title to the property for a cash consideration, passing in the ordinary course of business at the time of delivery of the commodity, and pertains to silver bullion.

The term margin is synonymous to security. It is generally spoken of as cash, stock collateral, bank guarantee,

or any form of security would be margin. It is a guarantee that is put up in connection with the contract to assure performance of the contract. Many definitions here apply to commodity stock markets. Many of the same terms are used on stock markets or securities markets. In some markets they do not have the general definition that I am applying to them, but by and large they are the proper and correct definition of the terms.

A switch as applied to a future market means the offset of a purchase or sale, and the contracting for a like amount in another option, generally in a further off option. The [fol. 408] original contract, and incidentally, that is a distinctive feature of futures contracts, the original contract itself cannot be sold. The liability and responsibility of that contract continues. The fixing of the amount of responsibility is determined or done by offsetting. That is, in the case of purchase for future delivery a contract buyer either during the delivery month or prior thereto may offset his responsibility for accepting delivery by making a corresponding sale during the same month in which he is obligated to receive. Then he switches over to a distant month generally and buys a like amount. That is a switching operation. Drawing on the paper here (witness illustrates) and designating the month of July and the month of December as forward months, and assuming the transaction takes place as of this month (May), a member broker buys from somebody one unit for July delivery. 500 ounces at 46¢. Sometime between now and July or during the month of July at the time that he is tendered delivery of that contract, he may want to switch his position over to December. Now he cannot get out of that contract. That is a binding contract, and he must accept delivery of it. I am indicating here on the chart the buying of one unit of 500 ounces — 46¢. Now in the interim, or at delivery time, he will sell, not that contract, but he will sell a like amount, one unit 500 Ounces at whatever price he can get for it whatever the market happens to be. We will assume it is 47¢. Simultaneously with that, or at about the same time, he will order or contract one unit 500 ounces, for December delivery, at whatever price he can buy it. We will assume the normal carrying charges between July and December at 1½¢. He is relieved of this situation here when delivery time comes, and the tender is made on that buy. (Witness indicates

July) Immediately that transferable notice, that is re-
[fol. 409] ferred to in the by-laws and rules, is given to his broker. His broker in turn looks up his books and sees who that is sold to, and that transferrable notice is passed, and that seller, now a seller, passes it on to whoever bought that from him, and so they will go through a dozen transactions on the futures exchange through the clearing house. But the actual switch is this transaction here (illustrates July) over to December. (Witness marks illustration one, with the word "switch" on the bottom and initials it.)

The main basis of the switch is to permit a person to hold his position for a period of time; while trading in and out, is just a temporary devise to catch short profits.

A closeout is what takes place in the customer's account with the broker. It is a situation in which a customer has bought a certain unit at a certain price for a certain delivery. Prior to that delivery date he sells a corresponding unit at a price. Now the offsetting of one against the other, and the statement of that on the books of the customer, constitutes a close out of that item.

Referring to this No. 1 (witness indicates chart) the illustration is between member brokers, but the same is true of customer in the different relationship. This item of a buy of one unit at 46, and a sale of one unit at 47, entered on the books of the broker for the customer's account, would constitute a close out of the customer's account as to that item. A customer might have a dozen such items. If all of them were close outs, it is a close out of the account.

Defendant's Exhibit A-1 is a book entitled "Risk and Risk-Bearing," by Hardy. It is a text book. I was familiar with the contents of that book and the subject matter of it at the time I established my operations in silver. In re-
[fol. 410] ferring to page 208, I had in mind the context of the text there pertaining to ring settlement and direct settlement. I am familiar with the operation, and I am familiar with the statement made by Hardy. I relied upon it: I relied upon that text. It is similar to the other standard authorities. This is a standard authority on the subject.

(Defendant's Exhibit A-26 received in evidence)

The author is Charles O. Hardy of the Brookings Institute. It is a standard book taught at the University of Washington in the course of Risk and Risk Bearing. On page 208 is a description of the set-up of the clearing house

and the method of trading on the Chicago Board of Trade. It states (witness reads from the text). Members carry accounts either as principles or as agents for outside traders. After a trade has been made, the seller and the buyer are both required to post 10% of the amount of the transaction at one of certain designated banks, as security for the fulfillment of the contract. In the case the price of wheat changes materially before the delivery date, the deposit must be adjusted.

These margins posted by the members with the banks must not be confused with the margins which the broker requires from his customer when dealing as an agent for an outside party. The broker is entitled to call a margin from his customer regardless of whether he is himself required to post a margin or not. There is no rule regarding the fixing of the margin which may be required from customers. The actual practice varies with the activity of the market, the amount of confidence the brokers have in his customer's financial responsibility, the value of the account to the broker and the readiness with which the customer can be reached in an emergency in order to call on him for additional security. In practice a great majority of the trades [fol. 411] do not involve an actual delivery of grain, although any buyer or seller can obtain delivery if he desires. This is true not because the contracts are factetious but because in most cases the grain is sold before it is delivered to the original purchaser. The methods employed in handling these transactions have been the subject of a considerable amount of uninformed criticism, and an understanding of them is fundamental to an understanding of the whole system of future trading. The courts have uniformly held that the devices by which A is substituted for B in the contract with C are legal so long as delivery is actually contemplated at the time the contract is entered into. For facilitating the adjustment of accounts which wholly or partly offset one another, a clearing house is operated by the management of the Board of Trade. This clearing house has nothing to do with the offsetting of the accounts, but merely provides facilities for settling the balances of payment due from one member to another. The text continues at Page 209 with a detailed description of what is known as direct settlements and the ring settlement.

Defendant's Exhibit A-41 is a chart which is merely a photostatic enlargement of the chart on Page 210 of the

text book. They are practically identical. This form of settlement is typical of clearing houses and was used on the Seattle Exchange. The principal advantage of these systems of reducing the number of open contracts is the immense saving in margins which result. So long as contracts remain open each party has the right to protection against market fluctuations to the extent of 10%, so that if there was no method of offsetting the trades the amount so tied up during the course of a season could grow very burdensome to the finances of the commission house. The method of ring settlement described in this chart and in Hardy's text is a common and recognized method of settling accounts between various brokers on standard exchanges, and also the method used by the Seattle Clearing House.

(Defendant's A-41 received in evidence.)

[fol. 412] The Government Treasury supervised those operations in Seattle. The Seattle Clearing House was appointed the official agency for the Treasury Department for the collection of sales taxes which are imposed against those transactions by the Government. Defendant's Exhibit A-42 is the report of the Chief of the Grain Futures Administration for 1935. The bottom one is the United States Department of Agriculture circular No. 201, on future trading and cash grain markets, published in January 1932. I was familiar with, and relied upon the contents of Government circular No. 201, just described. On page 10 is a chart, showing the fluctuations and the prices of wheat, grain and oats on the Chicago Board of Trade for the period of 1930. Defendant's Exhibit A-43 is a replica of that portion of the chart just referred to in the Government Bulletin for grain.

(Defendant's Exhibit A-43 received in evidence.)

This chart shows the general bearing, or relationship, between spot and futures transactions. As futures transactions are to be executed in the future, they reflect many of the conditions of the uncertainty which may enter the market or the commodity between the present time, or the spot time and future time specified in the futures contract. The general trend of the futures market bears a very close relationship between spot and futures prices. Following the chart, and picking out different periods, we find a very wide spread between the futures price and the spot price in October, which ultimately come together in January.

The normal difference between them is the cost of the commodity, the carrying charges, and the risk incidental to carrying and operating the business over the spot time until the time of future delivery. Superimposed upon that would be any untoward condition that might develop in the market, and immediately they break apart, and the nor- [fol. 413] mal spread is widened. The spread will widen only to cover the emergency temporarily. Over a long period of time, the spot and futures price have a relatively close adjustment to one another.

The term arbitrage, is very loosely used. A strict arbitrage does not come up until you have the opportunity, the facility for trading in a third market simultaneously with one of two other markets, as indicated in chart No. 2, upon which I place the initials, P. L. The professional member broker is primarily engaged in arbitrage business, dealing for his own account, or generally for the account of a bank as distinguished from a commission house that deals for customers. He is known loosely in the trade as a dealer, or professional operator. It may be his major business, or may be a special operation in connection with his general business. The effect of such an operation, if it is large enough, naturally brings the markets together. The selling in the high market reduces it, and the buying in the low market advances it, and there is a tendency to level out when the volume is sufficiently large to affect the market as indicated. When I say, "bringing the markets together", I refer, of course, to the price on the two markets.

Primarily, a dealer deals in differences. It is immaterial to him very largely whether the price is 50 cents or a dollar. It is the difference between what he buys and what he sells that his profit is.

These arbitrage operations are used by dealers in every commodity exchange in the world, and especially prominent in the foreign exchange market *market.*

Hedging is a two-market operation generally, although loosely applied to any buying and simultaneous selling. The proper use of the word "hedge" should be as between two markets. The word "straddle", should be used as to a buy and sell in the same market, as illustrated in this chart, [fol. 414] marked 3, with my initial. A broker who would buy in July a unit, and simultaneously, or thereabouts, sell a unit in September, regardless of what prices he did get them, would be in a straddle position.

The difference between a futures contract and a forward contract is that a futures contract goes through a clearing house under the standard form prescribed by rules and regulations of an exchange. A forward contract is a contract made between individuals, generally brokers, that is not cleared through the clearing house of the exchange, and may not, by its terms, be similar to the standard form of contract. The main distinction, however, is that one is cleared, and one is not.

The floor trader is a broker or representative broker on the floor of the exchange, who executes buy and sell orders as they are offered by other brokers, generally trading for his own account, and catching the differences between bids and offers during the period of trade on the floor of the exchange.

An odd lot trader is one who deals in less than the standard lot in which he buys or sells.

The net long position is having more buys or contracts to purchase. A short position is having more contracts sold than bought. The net long or short is the net difference between the two positions.

So called "cover" is the broad term of having means or facilities for hedging committments that the broker mas made.

A street account is the account held in a name or designation for the purpose of facilitating the accumulation or distribution of round lots. It is sometimes used for the purpose of concealing the true party in interest, the carrying of it in somebody else's name, so that the trade will [fol. 415] not be affected by the operations of the party in interest.

A discretional account is one in which the interested party is named, and the price and the amounts at which transactions are consummated and executed are left to the discretion of the broker. The common use of a street account by a broker is for the purpose of carrying on the account in a name, while accumulation or distribution is taking place. The purpose is to not influence the market by the operations of that party if that party's operations would influence the market.

A member broker is a broker in the business of buying and selling the commodity, who belongs to the exchange. A correspondent broker would be an associate of the member

broker. He would not be a member of the exchange. He would not be permitted to trade on the floor. His relationship to the member broker is that of a special customer, given special consideration in the way of service, probably a lesser commission, more statistical information and cooperation.

A customers' man is merely an employee of a broker who handles the business of a customer, much as a salesman does in a retail store.

I had no relationship, financial interest or otherwise, whatever, in the Louis Martin & Company, subsequent to June, 1933. I had no interest, financially or otherwise, with Gill & Company. I took care of Goggin's business when he was called back to California. When he came up here, he took it over. There was no relationship whatever, nor any agreement, as to division of profits through the transactions on the Seattle Metal Exchange between John R. Walsh, Gill & Company, or Goggin. There was no sharing of interests [fol. 416] or profits. There was no relationship between Pierce Lonergan & Company and the Seattle Metal Exchange. We are confusing terms when we speak of either Gill & Company, Louis Martin & Company, or Pierce Lonergan & Company as members of the Exchange. They were not. The individuals representing those companies were members of the exchange. The brokerage company went on its own business. I had a membership on the Seattle Metal Exchange. By reason of my membership, I could transfer the brokerage or handle the brokerage business of Pierce Lonergan & Company on the Exchange. Pierce Lonergan & Company was not incorporated. It was a trade name. It would be my operations on the Exchange as a member of the Exchange. The brokerage company acted as a dealer or wholesaler, buying and selling to other brokers in odd lots that their business had occasion to call for. My purpose in connection with that was to build the larger accounts with the idea of ultimately establishing a large market. The primary interest I had was in contacting bankers and financiers, outside banks, outside cities, with the idea of bringing to Seattle the activity and trading in which those larger interests might participate; in the meantime, filling the requirements of the men who were handling the local business. I felt it was in very competent hands.

There were several reasons for the use of street accounts by Pierce Lonergan & Company, or myself, as a broker. One was the breaking down of the round lots. For instance, in the Eddy account. There was no way of disposing upon this market of 100,000 ounces at one time to any one person for future delivery. Consequently that account would be carried in the name of what we call a street account. It might have a letter, or it might have been a number, and more preferably, it would be an individual, either a clerk [fol. 417] in the office, or some other party. I did not want to carry street accounts, in a number or letter. Employees were inexperienced, and did not know the significance of what an operation might be by a hedger or an arbitrager, and when they would see an account, and especially myself, selling on this market, they would get the idea that the market was going down, when, as a matter of fact, my right position might have been buying, because I might have been buying and taking over the Eddy account, and selling against it. As far as the inexperience would be concerned, they would see a selling operation on the Seattle Market. By the same token, if I wanted to take off an outside hedge, I would be buying on this market, and selling on an outside market. The real effect would be getting out of the market; and yet, to one who didn't know, it would look as if I were buying on this market. As a matter of fact, I would be just getting out of a hedge position. Consequently, it was desirable that my operations, where I was supposed to be somewhat of an expert, and naturally might influence other-, I used some other name.

Now, in the second place, what we term the technical position in the market is very confidential. Help around there was new, and I did not know who was coming in and out. It was a natural business precaution not to have gossip going out about what my position on the market was. There is a general tendency to follow the leader; as I tried to describe, if one were taking off a hedge, it would look as if he were buying in this market. In fact the operation would be to reduce commitments.

To the best of my recollection, I kept two street accounts [fol. 418] in Louis Martin & Company's office. There were two, I think, in Gill's office, and I carried two on my own books.

Pat Dineen was one of these street accounts. I gave the orders to buy and sell, and was responsible for procuring

and providing the margin. The street account was my own account. A customary method. The commissions on the contracts to buy and sell on these accounts were given to the other brokerage offices. They were handled just as a customer's account would be handled. As far as the other brokers were concerned, it was a customer's account. The margin that was used to secure these accounts was generally the cover, or hedge in the outside market. The accounts I generally had were either in the Pacific National Bank of San Francisco, or the First National Bank of Seattle, and an occasional contract on the New York market through one of the local brokerage houses. Those contracts and the rights in those contracts, were signed over as security, plus the contract that I had with the local broker. Both would be assigned as collateral.

Referring to Defendant's A-44, the first group are letters, cablegrams, between myself and Levy & Company of Shanghai. The second group are letters, telegrams between myself and McCabe & Company, of San Francisco. The third group are a few of the cable quotations that came in to us from Shanghai. Thise, (witness indicates part of exhibit); is a form of assignments that would be made on accounts to be held as collateral. This, (witness indicates part of the exhibit) the correspondence and letters between myself and the parties of the Hecla Mining Company, and this (witness indicates part of the exhibit) correspondence between myself and Ray Thompson, of Tacoma. This, (witness indicates part of exhibit) are telegrams between myself and Woolf, who was one of the big silver brokers of San [fol. 419] Francisco. This, (witness indicates), is a letter I wrote in reply to a letter I received from the Better Business Bureau of Seattle about April, 1934.

(Defendant's exhibit A-44 received in evidence, consisting of folio of correspondence.)

Part of this exhibit is daily quotations that come in to me from Shanghai. Referring to this particular cablegram, it would indicate that it took exactly twelve minutes from the time it left Shanghai, until the time it arrived and was transmitted on my teletype in Seattle. The average time of this cablegram would run from fourteen to eighteen minutes coming from wire from San Francisco, and from San Francisco up here on the telephone wire. We have this same service going the other way, after Mr. Ginsberg, of Shang-

hai, arranged it in April, 1934. That service was put in at his request, and he made the arrangements. Our connections with Shanghai was the fastest service there is in the world, and there are probably not two such services in America. S. Levy & Company is one of the biggest brokerage firms, bullion and exchange and securities brokerage firms in China. McCabe is a broker, having offices in San Francisco and Los Angeles, and became a correspondent broker of P. A. Jordan and Goggin & Company. Every broker, and every associate broker had a copy of the rules and regulations of the Exchange. The funds and securities of the clearing house were kept in the vault in the American Bank Building with a safe deposit company there. It was opened up right after the bank holidays. The transactions were recorded in a vault ledger kept by Mr. Walsh, and showed the deposits and withdrawal, and the change of collateral or securities which would be put up for credit with the clearing house association. It will show a net long and short position, the required margin, the debits and credits against that. The vault ledger would show entirely different from the long yellow trade sheet. The clearing house [fol. 420] sheet would merely show the summation of what was in the ledger, which would show the nature of the security and the cash position of the brokers with the clearing house. The clearing house sheet shows the credit, or book position of the brokers with the clearing house. This vault ledger was in the files, and were all stored away in the American Bank Building. I presume they were all turned over to the Government with the other things.

I kept a personal record of my own transactions with the clearing house, and a record of the sales and purchases of silver contracts for delivery to me from outside sources. They were turned in with the rest of the stuff. I have not seen any of these records since September, 1934. They were all turned over at the request of Mr. Swenson. Between one or the other, either Shanghai dollars or futures contracts or bullion, or the cash credit, there was always an excess of cover for the committments on the Seattle market. When trade began in June, 1933, the clearing house had approximately $5,500.00. Between June, 1933 to September, 1933, there was approximately 65,000 ounces sold on futures contracts on the Seattle Metal Exchange by Pierce Lonergan &

Company, and I had either the bullion or contracts for silver against which to make the offers of sale. They were put out at a spread of three cents. I cleared the silver contracts at an average price of approximately 34 cents an ounce, and contracted to sell on this market at an approximate average price of 37 cents. I had the silver for delivery, and was in position to deliver this silver due in September, 1934, and it was offered to the buyers. My profit for that amount of silver was approximately $2,000.00, which was realized when a tender was made, and the closeout or offset realized.

Cover is a broader term than hedge. Cover might merely [fol. 421] be a credit or bank account to guarantee your performance. A hedge is having the same amount of the commodity. Cover is the broader term, which might apply to having a credit, the same kind of commodity, bank guarantee, or something else, that would permit your performing your contract—that is, would cover your contract. Hedge is limited generally to the commodity itself, purchase one place, ready for sale in another.

At no time from June, 1933 to August, 9, 1934, was there any time that I was not hedged or covered at a profit on the basis of outstanding contracts I had on the exchange. I think there would be about 65,000 ounces open on the September 1933 delivery. As I went into December of 1933, there was approximately 130,000 ounces. There was a profit in the December delivery of approximately 3 cents. There was about 225,000 ounces open on the March, 1934 delivery, at about a 3 cent spread. I think I acquired this at about 42 cents, and the average daily price here was 43 cents. They moved up about 3 cents a delivery, or about 1 cent a month. The next delivery was June, 1934. There was open then, in round numbers, either 325,000 or 370,000, I would say 350,000 to fix the figure, in which I had about a 3 cent advance over what I had contracted, as I figured that was the only safe price. I was prepared and ready to make delivery of the contracts on the delivery months, and tender was made, silver was brought into Seattle for the December delivery in the amount of 125,000 ounces. Tender was made and they switched over into March and June delivery. When March came, the silver was there, along with a lot of other cover, and in March, tenders were made again, and they switched again. In the interim, of course, many had switched. They did not wait until March. About the middle

[fol. 422] of July, 1934, I had committments on this market for about 460,000 ounces, one-half of which were deliverable in June, approximately 35% of it deliverable in September, and I think about six or seven per cent due in March, of 1935. The average price of all of them stood at about 49⅛ to ¼ about July 27, 1934. There was little or no trading of any kind from early June on.

The Silver Purchasing Act, the Government's legislation on silver, had stifled all trading. A fifty per cent profit tax had been put on which did not allow for losses. You could not offset losses on trading. The Act was a very complicated Act, because it was tied into the monetary system, and a large part of it was left to the Treasury to establish rules and regulations for carrying it out. The rules and regulations were not published or available until sometime in July, and nobody knew what the score was. New York did not know. Everything was in doubt. The largest part of the contracts outstanding on the Seattle Market on the 27th day of July were not deliverable until the following December. The others were deliverable either in September of that year, or March of the following year. None of them were due for two months, at least.

From the experience of the delivery months of September, 1933 December, 1933, March and June, 1934, it became evident on those last two deliveries that the brokers were not buying for delivery; that they were dealing in futures. The deliveries ran less than one per cent on any delivery month while the stuff was right here in Seattle for delivery. I used every human effort to determine the meaning of the new legislature by correspondence, telegram. I had obtained the services of a committee clerk in Washington, D. C., so I could get the information. I had written to Key Pittman, whom I knew quite well, to get me a man back there [fol. 423] with some experience, and he got me a former treasury associate, who tried to tell me something about what was going to happen, and what the law meant. In the meantime, I tried to get information out of New York, and particularly, I was trying to get information out of San Francisco, as to what the Act meant, how it was going to be put into effect, and what the results would be. It was very difficult. Nobody knew. The bankers didn't know. If anyone else knew, they wouldn't tell.

About July 10th, we finally got a copy of the rules and regulations. It became apparent that our previous ideas

that this tax would only have an effect upon the profits was wrong; that the 50 per cent profit tax not only had an effect upon profits, but it also greatly impaired the marketability of future contracts, and that the amount of that impairment was unascertainable. We called a meeting. The question then resolved itself down to the fact that it would seem impossible for anybody to switch out of contracts, and go over into distant ones, even when September would come around, it was very doubtful what was going to happen; but apparently nobody could switch from a September contract over into a distant contract if they still wanted to carry silver, without taking a huge discount on those contracts, because whoever bought them up would either be up against paying a profit, or would be up against a profit tax. It was a question of making those contracts secure, of getting enough security up on both sides to determine and ascertain the deliveries in order to make a delivery good.

We held a meeting, and it was agreed that that was what would have to be done, and that security would have to be [fol. 424] put up. I arranged my security. I had some better than a hundred thousand dollars worth of credit available; and before daring to use that, because of the situation in New York, which was clearly a fictitious market, being artificially supported, it would be suicide to go in and buy on that market unless the contracts were assured of being performed. Consequently, the request that the brokers perform their contracts, they in turn made demands upon their correspondent brokers with whom they had contracts, and those brokers in Spokane, Bilberg, and Thompson, in Tacoma, made their demands. In the meantime, we had to determine what the market was, because by the obligations of the contracts in order to not be arbitrary as to how much should be put up on either side, we had to determine what the market was. There had been no transactions that would indicate to anybody what would be a fair security, and the only way to guage it was by the market, and you had to establish a market some kind of way.

Defendant's Exhibit A-45 is the United States Treasury Department Silver Regulations amended as of August 17, 1934, and amended as of June 5, 1935. The Silver Purchase Act is in this pamphlet. This Act went into effect by presidential signature on June 19, 1934. This legislation was not available to me until about July 1st. The full substance of

the Act was not available until about July 10th, 1934, despite the fact that I had wire service all over the country trying to find out.

(Defendant's Exhibit A-45 received in evidence.)

After the question of margins had been decided between the member brokers, we proceeded to carry out our ideas as best we could. Believing that the only possibility of getting support here, or getting any buying, would be so that someone could sell in New York, it was necessary to offer [fol. 425] 25,000 ounces. The object was to get a unit of a size, where even the most conservative and cautious person could buy on that market, and sell simultaneously in the New York market, a 25,000 ounce unit. I had to do the offering of that amount. Then, because it might not suit their ideas, when they wouldn't accept it in one option, the offer was made in every other option, and at that time there were four options, September, December, March and June on the board.

There were no bids of any kind, even for that amount. However, the unit of trade on the market being 500 ounces, had anybody wanted 500 ounces, all they would have to do would be to bid for that 500 ounces and take it out of the 25,000. In other words, these offers were always 25,000 ounces, or any part of them; so, it did not discourage anybody from buying a lesser amount if they so desired. But, anybody buying a lesser amount would not be able to hedge simultaneously in the New York market.

The brokers who were in the long position at the time the margin call went out did not comply with the margin requirements.

I had three different parties ready with from anywhere from $25,000.00 to $50,000.00 to put up to buy in San Francisco the minute we could determine how much silver we were going to have to deliver on those September and December contracts. There was nobody bidding at any price, and it was offered cheaper and cheaper. There was a wire into Spokane giving those offers out. There was a wire into San Francisco giving those offerings. The quotations were in three different newspapers in Seattle, and there were one or two other brokers here who had some communication system. It was generally and publicly offered [fol. 426] everywhere that we could reach.

There were no offers to buy until I felt half way assured —I wasn't assured I was right then. To bid that market at six cents under New York, if these brokers could make good their contracts at that price. My opinion was that these contracts would probably be worth fifty cents on the dollar. In other words, that if you had an active market, that the proper bidding and selling price for those contracts would be probably 24 cents. There was no way of knowing. Nothing like it ever occurred in the silver markets anywhere in the world, and certainly, not in America. There was no criterion to go on. The reason for offering was to let everybody else express their opinion. The brokers with whom I had contracts were not able to put up any part of the 15 cents. They were not able to put up the 6 cents under New York, and as a net result, their contracts with me were not worth the paper they were written on. I am referring to the offsetting sales these brokers made on the 31st, to eliminate their losses. There was no way for them to get out of their contracts. Those contracts could not be cancelled until September or December. The only way they could limit their losses was to offer to sell a corresponding amount. They did offer to sell, but they had no security. I did not want to take any advantage of the situation. I could have bought those contracts in in my street accounts, and if there was a profit, pocketed it. Instead of that, I bought those in the Piggot account, and if there was any profit in the thing, it would have been Piggot's profit. There had only been a small profit in the 3 cent spread between New York and Seattle, and if you were buying in Seattle, and going to sell in New York, you would figure you would have to have about the same 3 cent spread, and any account that purchased any quantity of silver in [fol. 427] Seattle figured that ultimately he was going to have to accumulate it from these brokers in odd lots, get it into round lots, and then sell it into, or deliver it into New York, as against his selling contract there, he would have to figure at about the same expense.

Again, the chances are the expense would be greater, because of the situation. In order to get that 3 cent spread, and pay the Government a 50 per cent profit tax, would mean that he would have to have a 6 cent difference. Mr. Piggot said that if I could show him a profit he would take a deal. When the purchases were made for his account at 41, it was on the basis that that would demonstrate a profit

between the Seattle purchase price and the price at which he could sell the silver in New York if the contracts were kept good. If all the outstanding purchasing contracts from the Seattle Exchange had made good their margin requirements at the time the margin call went out, they could have been covered at about 2 cents under the price contracted in Seattle. The contracts in Seattle were out at 49 cents, and they could have been purchased on the outside market at 46 or 47 cents. The brokers who were offering to sell on July 31 for the purpose of offsetting their outstanding buying contracts, put up practically no security. I believe some 63,000 ounces were secured.

I did not resort to the Piggot letter of credit, because there was nothing to offer Mr. Piggot. Those brokers who had contracted to sell some 400,000 ounces of silver, they could not guarantee. Consequently, their offers were never consummated, and no transactions were transacted on the Seattle exchange subsequent to July 27th. With respect to the brokers contracts to sell, made subsequent to July 26th, there was no way of carrying them out—they had no credit [fol. 428] and no guarantee. It was a mere gesture or offer that they would do something. Under the rules and regulations of the exchange, it was necessary for the margin requirements to be placed with the clearing house on these contracts within an hour after trading, in order to complete the contract. The selling brokers of July 31st did not perform any substantial part of it. They did for a small part.

You get a change of conditions there then very rapidly when you have got a market that is liquidating. It is no longer a market. It becomes a question of one of several ways of liquidating a position between a creditor and a debtor. There was the question of receivership, and there was the question of making an amicable settlement. There was the question of suing on the unpaid balances that would be due on those contracts. It then became a matter of conference, a matter of discussion on the condition of these different brokers, these correspondent brokers in Seattle, Spokane and Tacoma, and the Norman Edwards Company had contracted the main part of that market in their own names.

Martin & Company, having contracted for their customers' accounts, 80 or 100,000 ounces, less than 20 per cent of that market.

Gill & Company hadn't contracted more than five per cent probably.

75 or 85% of that market was in the hands of those correspondent brokers under contracts between them and the other members brokers.

What was to be done in the individual case of these cor-
[fol. 429] respondent brokers in order that they would be put into a position to settle with the member brokers they had contracted with, was a matter of the individual financial condition of that correspondent broker, and that condition would depend largely on what the financial condition of his respective customers was.

To start lawsuits against those correspondent brokers would mean receiverships, and they immediately bring suits for damages against the customers for their unpaid balances on their contracts, and the unpaid balances run anywhere from 35 to 40 cents an ounce for what they have contracted.

The only way you could do it was to agree to do what I did do, that I would settle with Piggot, if they would settle with their respective customers. Otherwise, there was nothing left for me to do but go in and sue them for receiverships, and collect enough from what these correspondent brokers owed to make good so that they could liquidate their claims, and make good to me, and there wasn't a chance in the world of their making good to me without a horrible deficit to those correspondent brokers, and to those customers, and I wouldn't do it. I didn't do it.

We followed the same procedure in the clearing house to clear the transactions of the brokers, as was used by New York.

In order to relieve those brokers, we matched out of a sale; their buys just cancelled them out.

It is the only thing you could do.

[fol. 430] There would be as many different reasons for the member brokers not fulfilling their marginal requirements as there were circumstances of those brokers. I do not know what the response was to the margin calls against the customers, except in a general way. I wouldn*t's* know what happened — Billberg's office in Spokane or through Thompson's office in Tacoma. It would be reflected very largely through Louis Martin & Company but I would say there were about 65,000 ounces out of approximately 465,-

000 outstanding that produced their margin requirements. Those contracts were outstanding at 49½ cents an ounce.

The commitments on the markets did not change and couldn't change because they were not due for performance for some two months later. The official price of silver bullion quoted in Seattle from July 23 to August 4th or 5th was about 46½ cents an ounce. The First National Bank of Seattle was offering to buy bullion if anybody had it to sell, during that time. In long periods the purchasing power of silver is constant, and it is today. The comparison I made in 1931 against the purchasing power for wheat was that one ounce of silver will buy approximately 40 per cent of a bushel of wheat, and that is true any time you want to pick, it is true today. The guarantee of performance of outstanding contracts to sell on the Seattle exchange were covered in Shanghai dollars, because Shanghai dollars is the customary acceptance of cover by exchange banks, silver brokers all over the world. Shanghai dollars are worth merely their metal content, due to the fact that [fol. 431] the credit of the Government has been for a long time impaired; the metal or currency of the country is worth only its metal value. In the Shanghai dollars there are four decimal points in the silver content, but there is approximately 80% of an ounce of silver, that is, up to the thirty days after the passage of this silver legislation when China went off the silver standard. China now has paper currency. The price of those Shanghai dollars followed the price of an ounce of silver. I never characterized the purchase of contracts for future delivery of silver as a safe investment. The purchasing of contracts of silver, if performed, if people were in a position to buy, were a good buy, a proper form in which to acquire silver, and if they would keep themselves properly margined so as to take care of any interim fluctuations, and be prepared to perform their contract, it was a safe form of investment. Those statements were true then, before and since and still are true.

There were never any statements that we were connected with any other exchange, or any other market; it was stated that we had contacts with them, means of doing business with them. We did have. I never stated at any group meeting that the clearing house had a trust fund where all the margins were either held for the purchase of silver or settlement of contracts. I stated that the clearing house

of the Seattle Metal Exchange was a clearing house, that it operated for the purpose of transactions between member brokers; that it was an organization or institution to facilitate business between the member brokers only. That the customers had their relations with the individual brokers [fol. 432] and must look to those individual brokers for performance of contracts. As far as discussing it with the public—these questions never came up.

A three day recess of this market would result in their being positively no way to determine what the rights of anybody would be in those contracts and what the liability or responsibility of contracting parties on either side of those contract- would be for this reason: The market had already shown that it was drying up and that the silver purchasing legislation had demoralized the activities of both New York and Seattle. Now, if you close that market, or in any way intimate that there was an impairment of those contracts, immediately everybody would sell and want to get out. They would want to offset their losses, naturally. Now you have a situation common in all such markets; that there would be some people who either could not or would not attempt to offset their losses. There was no way of telling how many or who or where they came from that would do that. To illustrate, in the Spokane office, if enough of those customers refused to go ahead with Billberg over in Spokane, the people who did go ahead with their contracts might not be able to get their silver, by reason of the fact that Billberg's credit had become impaired. That would mean then an insolvency proceeding or a liquidation of the Billberg office. The net result would be that the people who were ready to go ahead would be no better off than the people who refused to go ahead, or failed to go ahead. That is exactly what took place on the whole market. You couldn't anticipate or know anything about that on July 26th or 27th or July any time, until people were given an opportunity to go ahead. If those people were ready to go ahead with their contracts, maybe those contracts were not impaired. Maybe the interpretation that we made on the Seattle Metal Exchange was wrong. On the reopening of the market after a three day cessation you would have no bottom at all to the market.

[fol. 433] The resolution prohibiting short selling was passed by the Board of Governors on the 28th. There was

plenty of support for that market if it could be determined at what price business could be done. The resolution on short selling was just a futility, it didn't accomplish anything, but it did relieve the idea that there would be any pressure upon the down side of the market, if anybody had any such ideas.

The list contained in Plaintiff's Exhibit No. 5, I never saw before it came into the Courtroom; I never gave it to Mr. Coventry, nor did I give him any prospect list of customers, nor a list of prospects to any brokers or members of the Seattle Exchange; it wasn't my business.

I heard the testimony of Mrs. Coventry in this courtroom; I did not state to her that I had the sum of $25,000.00 in my pocket, nor that I was going to break the market wide open the following day. Her testimony is false in that respect and in all those statements, absolutely. I recall the occasion of Mr. and Mrs. Coventry calling on me to inquire about the mother's account—it was in the fore part of August. They came into my office and told me that they had not been able to get any satisfactory understanding with Mr. Walsh, in whose company they informed me both Mrs. Lyman and a relative of Captain Coventry, I understood his father, had some small account. I told them I knew nothing about the transaction. I told them that whatever would be done on that account I imagined would be handled like everybody else's account; that they would have to take the matter up with Mr. Walsh. They again told me they had it up for some time—ten days or two weeks, and they weren't getting any satisfaction. Then Coventry came out with the statement, "Well, Pierce, there are two stories [fol. 434] that I can tell on this, and I will tell the story that will get me the money." Such a statement coming from such a man was just paralyzing; I couldn't believe I heard him right. I said to him, "Well, I don't know any story, Captain, but one story, and that is the only story there is." He said, "Well, no there isn't, and I will see that I get my money." I was quite angry at the statement. I walked to the door, opened it and told him I guessed we could have no further conversation; that he and Mrs. Coventry had better leave. They walked out the door.

The margins were not reduced in fact in the early part of July. After the passage of the silver purchasing act the different brokers and associate brokers were called in,

and the Act, as best we could interpret it, seemed to have its main objective in the fifty per cent profit tax. After two or three days of conference it was thought that the obstacle of a fifty per cent profit tax could be overcome by reducing by half the commissions that would be charged, and by reducing by half the initial margins that would be required. It was assumed to be a safe and practical operation, by reason of the fact that the Purchasing Act had committed the Government to a policy of purchasing silver until such time as the price of silver would go to $1.29 an ounce, or until there was enough silver in the United States Treasury vaults to equal in value 25% of the gold that was in the United States Treasury vaults. We were satisfied from our statistical information that the American Government could never buy, and there wasn't available in the world markets enough silver to put into the American vaults 25 per cent of its gold reserve, on the basis of some [fol. 435] seven to ten billion dollars. So consequently the only other answer would be silver going to $1.29 an ounce, and that had been our prediction from 1931; and it looked very safe that there wouldn't be any substantial setbacks. That is the reason that margins were put down one-half and commissions one-half. We naturally expected the market to pick up. We thought we were on the way. As a matter of fact we didn't know at that time and nobody else knew that the 50% profit tax not only applied to the profit, but that it would also cause the marketability of future transactions to entirely disappear. Later on that became evident, not so long after this deal was over. When we did correct that viewpoint about the 25th of July, it became apparent from further study that the marketability of the contract- themselves, the market value of those contracts themselves had become impaired. The best opinions that we could get was that they had become impaired only fifty per cent. Subsequent experience showed that they had become impaired to the extent of zero. But at this time, at the reducing of the margin—that was our opinion; as a matter of fact there was little or no business done on that basis. The reduction of the margin was no action of mine—it was the result of conferences of the brokers on the exchange. I did not report to anyone that a California syndicate was offering silver here; on July 27th when Goggin offered the 25,000 ounces of futures there was naturally a

great deal of inquiry and comment. I was extremely busy trying to get in touch with San Francisco and banking connections, and so on, here, and evidently the brokers had been talking among themselves. I got around in the afternoon [fol. 436] and they came to me and asked me, they said, "Lonergan, we understand that Goggin has been offering silver. They tell us that there is a California interest offering 200,000 ounces. What do you think about it, how much have they got, etc?" The question was then to state whether in my opinion those contracts were worth fifty cents on the dollar or not. If I stated my opinion it would cause, inasfar as I had any influence or my opinion was worth anything, it would cause people who followed that opinion to have the same opinion; there would be no support to that market anywhere under fifty per cent, which would be 24 cents. The more they got at a bargain price, why, of course the more attractive the deal would be. So they were told that they could get 200,000 ounces or any part of it. The rumor that the California Syndicate were offering silver did not originate with me. Later I told them they could have 300,000 ounces or any part of it. That meant that they could have 10,000 ounces or 20,000 ounces.

I have never seen the letter addressed to Mr. Frank Givens set out in Count I. I had nothing to do with the dictating of it, or the mailing of it. I had no contact with Mr. Frank Givens.

Prior to the indictment I knew nothing about the letter to L. C. McCaslin at Port Orchard, Washington, signed Jack, set out in Count 2. I had nothing to do with the signing of it, nor did I direct it or order the sending of it.

I did not authorize or direct the mailing out of the market letter of July 13, 1934, sent out by the firm of Louis Martin Company, a copy of which is set out in Count 3 of the indictment. I want to state that in connection with [fol. 437] that my opinion was asked about the matter contained in there, and I endorsed those opinions. I did not prepare the letter. In connection with the market letters, at different times I had been asked to make a statement of some kind that could be quoted as President of the exchange, and I have recollections of making statements similar to that. I don't know whether they are the exact ones.

The letter addressed to Frank Anderson, Yale Avenue North, Seattle, Washington, coming from Norman Edward

Company, signed Norman E. Coles, referred to in Count 4, I did not direct or authorize the mailing of that letter and I did not prepare it.

The letter addressed to Norman Edward Company and sent from J. R. Walsh of the Louis Martin Company, referred to in Count 5, I did not prepare that letter, and did not direct or order it sent.

A letter to Mrs. Lillian J. Lyman in the Assembly Hotel, signed J. R. Walsh of the Louis Martin Company, referred to in Count 6, I did not prepare that letter, nor dictate it, nor mail it. I had no direct contact with Mrs. Lillian J. Lyman in connection with the substance of that letter.

A letter addressed to J. I. Romer in Seattle, signed Norman E. Coles of the Norman Edward Company, referred to in Count 8 of the indictment, I did not prepare that letter, or authorize its sending, or give any directions with regard to its mailing, and I didn't mail it. I will say that that deal was discussed several times with me by Mr. Coles, but now with reference to sending any letter.

I have no knowledge of these particular letters being sent. On the 20th day of August, 1934, I left here to go to [fol. 438] San Francisco to close up the final business of the Pacific National Bank in San Francisco, and to try and determine what effect the Silver Purchasing Act and the government's policy was going to have in the way of preventing the carrying out of silver transactions with the Orient and foreign exchange transactions. I went to San Francisco for that purpose.

I got in touch with Seattle and was advised that I was being framed up here, and to get back. I closed up the business with the Pacific National Bank through Goggin; drew down the money and came back here. I went into conference with Mr. Swenson. I told him he could have the books; he seemed anxious to get them. I had them brought up there. I told Mr. Swenson I wasn't familiar with the books of the other companies, or the clearing house, but that I would get the bookkeeper who had charge of the clearing house books and who had been trained for a year and a half. I had her go up there for a series of two months or more.

I explained the operation of this market and the position that I held on it as I have explained it here in the Court.

It is my opinion that there are not 500 men in the United States who are capable of analyzing the legal and financial and exchange complexities of such an operation. I suggested to Mr. Swenson that I could get him experts, or for him to pick his own. I would explain to them these transactions and the complexities of them. I was never given the opportunity to explain. I was never given a chance to explain anything.

The purpose of the group meetings was to conserve my time and explain to the associates in the enterprise the basic [fol. 439] ideas regarding silver, the basic ideas regarding the operation of the silver market, of the commodity market, to those that didn't understand them. Quite a few of them had a working knowledge of commodity markets.

I never ordered or directed anyone at these meetings as to what to do. There was no occasion for that. I had no authority to order or direct anybody else. I was the president of the Exchange. As such my rights were merely those of the Exchange as an executive officer, to do those things that would bring about an advancement of the Exchange or of the Association.

About August 1st, I made a statement to Arthur Sternoff. I had heard he had been coming to some of the officials, and that he was stirring up clients to start a lawsuit, and I told him I could not see how his services could be of any help in these matters. The situation was complicated and confused enough. He said he was going to quit Louis Martin & Company, and I told him I thought it would be the proper thing to do, as long as he felt the way he did, That afternoon, some two or three hours later, I saw him in Louis Martin & Company's office at a typewriter. Walsh wasn't around there. I recognized he might be writing most anything that would commit Louis Martin & Company, and I directed him to destroy the letter he was writing, and he did. He asked me who was running the place, and I told him emphatically that anything that affected the Exchange or that Association of brokers that I was running it. That any broker or brokerage house that wasn't in line with that policy, I would see that they got in line. At the broker's meeting I had made the statement regarding the accounts between brokers and customers, such as in Hardy's work, that exchanges constituted the association of members; the members made contracts between themselves

which covered their position, or hedged their position in [fol. 440] connection with contracts that they made between their firm and the customers, and that the responsibility of the contracts between customers and brokers was between the two of them.

At these meetings I tried to define in a general way the functions and operations of the clearing house. That it was a facility for the members, and again referring to the authorities and text books describing how it operated, much in the fashion of the bank clearing house. That such clearing houses were common in future markets, commodity exchanges. I frequently referred to the complexity, and told them it could not be understood without a very technical study of the matter.

At the meetings I explained that the customs and practice and the business principles underlying margins, the reason, what their function was, the different types of them, and frequently illustrated that in such dealings between banks, no margin was put up at all, because if two banks were dealing with one another, the credit of each bank was satisfactory to the credit of the other.

At these meetings I was very emphatic about customer not being abbowed to trade in and out of the market. We had just had the experience of general public trading in and out of the stock market, that such an operation was not an investment, and cautioned them that it couldn't be beat, that no one knew what the high or low of any market was, and that for anybody to attempt to guess from day to day, or from week to week, and change their positions accordingly that it was futility, that it shouldn't be done. That our purpose here was to accumulate silver, and that it was part of the program to carry on so that when *when* silver was accumulated in the hands of the public, then we were in a position to go on with the next step.

[fol. 441] The type of operation I recommended was that they buy for a future date, and when the date came due, that they pay for it and take their silver. And if they did not want to do that, they could carry on over any rise in the price of silver, plus the money they had, and that the local banks were willing to loan somewhere between 40 and 60 per cent on the bullion, and they could use that if they wanted to. I had relations with banks where they could do it.

They were told that the rules were the same as the ones in New York, and were similar to those in Shanghai, where from time to time the price might break six cents—three cents. Their attention was called to the New York spot market, where the price might be changed as much as six cents in one day.

That the people would have to keep themselves well secured, well margined, and the only way they could be safe would be to be in a position to buy their silver at all times. That nobody could guess what was going to happen from day to day.

I explained that a futures contract was a contract for future delivery of a commodity; that it was a standard form, describing the specific grade or cost of silver, the weight of it, the fact that it would become due on a certain specific month, and that the buyer could not decide the particular day of the month he would get delivery of the silver, that that was the seller's option, and whoever the seller was would decide whether he wanted to deliver on the 1st, 10th or 15th. The buyer would have 36 hours notice to put up his money with his buying broker. That he would be delivered a receipt from one of the local banks, a safe-keeping receipt from their vault, and as against this he would pay his money. That if he didn't want to con- [fol. 442] summate the deal in his broker's office, he could consummate it in his own bank. That if he was dealing with a bank that did not have silver stored in the vaults, that it would be shifted from one bank to another, and he could pick his own bank and close his deal.

At the meetings I told them that the general basic principles of our exchange were the same as any other commodity exchange. That we had practically copied verbatim the rules and regulations of the National Metal Exchange, which was later consolidated into the Commodity Exchange, Inc., and that every broker and member broker had been provided a copy of the rules and regulations of the Exchange and clearing house.

At the group meetings, they were told emphatically, that the Exchange was only an exchange of member brokers, and that it was only the private quarters where the brokers met, that the Exchange neither bought nor sold silver. That the contracts of member brokers were assigned to the clearing house, as security for the performance of the

contracts between different member brokers. That the relationship was purely one between the members, not between customers. That was stated in letters that I sent to the Better Business Bureau, and anybody else that had a right to inquire.

It was explained that customers dealt with their brokers, that the broker was responsible to them.

At the meetings, it was explained that it would cost about three cents to do business between the two markets, of buying on the New York Market and selling here. It would be three cents higher here. If there was buying here, and selling in New York, it would be three cents lower here. That was why the six to eight cent margin was talked about. [fol. 443] The transaction in which Mr. Walsh, along about the 23rd of July, sold 100,000 ounces of silver in New York, was an assignment of that amount of silver previously made by him on short sales, as we would call it, in the street account in his office, and I had assigned to him that 100,000 ounces, or the equity in it, as protection. When it came out of the clearing house, he walked down to the bank and ordered it sold. It was sold at that time because it was determined that there was going to have to be silver brought into Seattle to deliver as against the outstanding contracts, and the way to shift silver is to sell in one market and buy in another. The operation was an operation to sell in New York, preliminary to buying on the credit that I had arranged in San Francisco. This credit was the credit that Lamping had arranged, the Reconstruction Finance Man, the credit arranged with Lawrence Arnold and Piggott. There was a credit of Mrs. Meltzer, a credit of Mr. O'Connell. The setup would be, of course, to contract in San Francisco, which would require the delivery and shipment up after it had been melted down at the Mint in San Francisco, into United States Mint bars, preliminary to the actual delivery in the Seattle Market.

I did the same thing with Mr. Everett here, who held 200,000 ounces of silver, when I shifted his silver from New York to Vancouver. We shifted 200,000 ounces of bullion here.

I retained no lawyers here at the time of the operation of this market. The only one I ever conferred with was Mr. Luckerath.

I had known Mr. Coles for years. I knew that he had put over this Continental Mortgage Company, and that he was considered a very successful broker and business man, and knew the brokerage business. I felt that Walsh made a very valuable contact when he got that man asso- [fol. 444] ciated with him as a correspondent broker. I had never had any previous dealings with Coles.

At the group meetings—the difference between the price of one option and another was explained to the brokers and described as being the costs of carrying from one month to the other, and that a dealer looks to his spread, to his difference in price—his profits and operating cost, that was explained to them. It was shown that where December silver was selling at 45, and March was selling at enough spread, there would be a chance to make substantial interest charges. The only persons with whom I effected that arrangement was Miss Spear, who it seems had been a customer of Coles', up at one of the brokerage offices, and was making a great deal of profit speculating on margins there, and eight or even twelve per cent didn't seem to interest her. There was also a Mr. Enquist. Such an occurrence comes out of a straddle position in the market. If June is selling at 46, and December at 47, there is a spread of 1 cent. By contracting on the buying side at 46, and contracting on the selling side, assures that profit. Sometime between the time you get into that position, and the June delivery time, you cancel that out by a closeout, or off-set. You wait for an opportunity where sometime in the market you can sell this. It does not make any difference whether it comes up or down in the middle months, when you can sell on this market, and buy on this market at less than one cent. If you can buy on one and sell on the other, at an even price, you have cinched your one cent. Now if you have a six cent margin up, you have made on your transaction 1/6 of whatever the amount of money is you have up on margin, from the time you went into your commitment until you off-set it. It can't be more than a perior of three months in any event, from time of deliv- [fol. 445] ery date until you carry it over. You can accept delivery, if necessary. Of course that would require putting up the balance of the purchase price over and above the six or eight cents. Then you carry your silver to the next delivery date, and deliver at the selling price, if neces-

sary. You put your silver away, and you have your contract on the sale.

There is a guarantee of one cent profit to be met sooner, or at time of delivery.

The safety factor is to have your bullion.

At the time of the proposal with Miss Spear and Mr. Enquist, the spread was so great that I told them that for three months' period there they could get at the rate of three cents per month. The agreements or contracts with Miss Spear and Mr. Enquist were performed. The trouble was I could only give it to them for those short periods. They insisted on withdrawing from it themselves, and wanted to go in with Coles.

There was one telephone number used by practically all the brokerage offices, because a communication system, speedy and efficient, is the most valuable thing to a broker. Knowing that in 1931, when I organized the Seattle Metal Exchange, I not only tried to cinch the name, but also the telephone facilities. Ultimately it became a trunk service and a central line, and there is only one other such facility as we had under that operation in the City of Seattle, and that is the Terminal Sales Building. The wire service we had in Shanghai was a special service wire. I think there are only three such coming into the country.

[fol. 446] In seeking support for the Seattle Market, (about July 27th) I cabled Shanghai, and advised them that I wanted some daily bids and offers. We had had, of course, cable correspondence regarding the silver legislation. It looked as if it were a golden opportunity to sell on the exchange, especially outside the United States, where they would not be subject to the profit tax. I cabled Gensburger, who was a senior partner, and the man who had been over here, with whom I consummated a deal.

In typical Shanghai fashion, I received a letter from him a month later. The letter is here (indicating a paper witness has in his hands). It states: "July 26, 1934. We are confirming receipt of your cable of today's date, and in reply we would like to ask, how can we possibly buy or sell silver in Seattle with these new silver regulations in effect? On any profit that we make on silver purchases, we would have to pay a tax. If we are wrong, let us know immediately. In the meantime we will await your letter. Kindest personal regards, Levy & Company, by Gensbur-

ger." A postscript: "We do not know who is better off as far as weather is concerned, Chicago or Shanghai."

"Weather" in the above letter referred to a code arrangement we had when he was over here in April. When he referred to the weather, it meant he was sending information as to the market condition of Shanghai, and instead of comparing Shanghai and New York, he would compare Chicago. So that code means that their market condition there was about the same as it was in New York, all disturbed, and nobody knew the score.

[fol. 447] I got in touch with Kauffman in San Francisco on the telephone. I asked him to put some bids into this market. He had already been in the market some ten days previously. I mean the Pacific National Bank was. He wasn't. The bank was in as a customer. He said he wouldn't understand the New York market, that they were backing away upon any bids or offers that were made there.

I got in touch with Wolf down there (San Francisco). Wolf is one of the big silver brokers. He has been in the business thirty years. I asked him to phone me back if he could get a pick-up on what the situation was, or what the experts down there were interpretting the situation to mean. He wired me, dated August 3rd: "Regret silver. At present too much Government red tape involved. F. L. Wolf & Company.

I first made contacts with Shanghai, Levy & Company, in November, 1933. We had shipped some bullion over there to Shanghai in 1932, to Heath & Company, but the first contact I got from Levy was an inquiry from them. They wanted to set up a test service between Shanghai and Seattle. We tested the service for several days. I got a wire from them (witness indicates) that the service was satisfactory, and they put in an order here about the middle of November to sell 100,000 ounces. They were satisfied with the transaction. Remittances were made back and forth. They said the arrangements were satisfactory, and they wanted to deal in 250,000 ounce minimum orders. We negotiated from that time until Mr. Gensburger's answer came over in April, 1934.

We made arrangements at that time that I would trade in [fol. 448] minimum of 100,000 ounce units. Arrangements on guarantee margins, etc. were made here. The service we had took about an hour and twenty minutes one way.

He had arranged while he was over here for a preferential service and rates which has some sort of a priority that comes next to Government's service and communications around the world. An arrangement of a service in which we would send and get answers in about 28 minutes.

The arrangement made with Gensburger provided for minimum orders of 100,000 ounces with a three or four cent margin. In March 1934, I went down to San Francisco. I made arrangements at the Pacific National Bank to carry an account for our brokers up here for two or three hundred thousand ounces for any one of our brokers. Arrangements were made to carry it on a three cent margin. They would deal in 25,000 ounce units on up. The arrangements were satisfactory. The bank became a customer of P. A. Jordan, which was Mr. Goggin, and he sold direct; or that bank sold directly.

Between July 27th and August 9th, I advised any of the brokers that any contracts they could make good or put up any reasonable assurance they would make good that their contracts would be reinstated. There would be no arbitrary cancellation. Even after that they did not come in and put up their security in their own bank, or any place they wanted to do it. They were given up to the 9th of August, the presidential decree came along on the 9th of August, and it seized all silver in the country that was not under contract. You couldn't allow people to reinstate their contracts, after that day. It was illegal. The silver [fol. 449] had been seized. Anybody in default on that day, no matter how much money they had, or what their desire to reinstate themselves, it could not be done under the proclamation. It was then a matter of adjustment. I said I would stand back, and settle with Piggott, and those four or five brokerage houses settle with their customers.

As to the volume of transactions negotiated for street accounts, that volume would be just one-half of what it would appear to be in the books. The clearing house had been appointed by the United States Treasury, for the collecting of what is known as sales tax. That is different from the profit tax. It is a 3 per cent tax per One Hundred Dollar value on all contracts for future delivery on any commodity anywhere in the country, and it also applied to silver as a commodity.

A representative of the Treasury, not knowing what way I should report an official quotation, thought we might get

into complexity with some other member of the Treasury Department coming along later, checking the books a year or two after, might see these quotations, conclude that we had put through, and had been an actual transaction, and that there would be a claim made by the Treasury at a later date on those sales taxes. To avoid that situation, and to show what actually did take place, a nominal transaction for a minimum unit was put across, so the record would show that there was no attempt to avoid the sales tax. Now there was a larger volume of transactions between street accounts, in which I had my balance or cover transferred from one broker over to another in anticipation of, or because of actual cover, which I had arranged outside. [fol. 450] To swing a large amount out of one brokerage office, would be like removing a large sum of money from one bank and putting it into another. Consequently those were put over in chunks, of 15%, 20% at a time. It would be the gradual transfer instead of a removal of 150,000 or 100,000 ounces of silver. There was no publication of the transactions, so the public or the customer could not be deceived in any manner. The volume of transactions on the quotations were not disclosed to the public, and had no effect on the prices or market conditions, because it was private transactions resulting in no change of price or no change of quotation.

The expense of carrying the accounts in the First National Bank in San Francisco, in round numbers, amounts to about $5,500.00. The Shanghai Dollar account in the First National Bank of Seattle was five or six thousand. The Eddy account, carrying the bullion, cost $4,500.00. The entire expenses I used for my operations running around the country, including my living expenses, amounted to about $400.00 per month. Out of that I was making trips to San Francisco, publishing pamphlets, running the office, and living expenses. My net return out of it all was $400.00 and some dollars.

(Defendant's Exhibit A-46, -1, -2, -3, -4, received in evidence.)

Cross-examination:

The Seattle Metal Exchange was incorporated in 1931, with a capital stock of $1,000; myself and my wife were incorporators. For about six or eight months there was an

effort to sell spot silver. There was no dealing in silver futures contracts until June, 1933. About June 20, 1933, P. A. Jordan & Company was formed by Mr. Goggin, my brother-in-law. It was not formed by myself. Mr. Goggin was in California; until he arrived here in September, I operated the P. A. Jordan & Company under an agreement [fol. 451] between him and Mr. Dineen and myself. About the 20th of June, 1933, Gill and Company was in existence. Louis Gill was in charge of that Company. He had been a student from Gonzaga University. He had been in the wholesale drug business before he went into silver. I was the president and operator of Pierce Lonergan & Company. It was not a corporation. It came into existence about June 20th, and about that time the Company known as Louis Martin & Company was revivified. Merely picked up to save expense. I transferred my rights in that Company to John R. Walsh. Mr. Whalen was interested in our effort of 1932. He still has his stock in the Louis Martin & Company for one-third, and Mr. Walsh had two-thirds.

There was a fifth company, Arnold Lenenschmidt. The company was just about to become active, and he went to Los Angeles with the idea of operating there. The Board of Governors had control of the Seattle Metal Exchange. The clearing house was under the control and Operation of myself, Walsh and Goggin. Mr. Walsh handled the affairs of the clearing house, and took care of the clearing of contracts between brokers. My part was merely supervising it generally.

The $5,500.00 set up in the clearing house in June, 1933, was paid in by member brokers.

I was between the period of June, 1933, and September, 1933, selling contracts for the future delivery of silver, and there were other contracts on the other side coming in for the purchase of future silver. The buyers were the other two brokers, Gill and Walsh. They did not have to represent customers. They could contract on their own account if they didn't have customers. In that period, I had the short end of the market, and traded against the 65,000 ounces, and either purchased outright, or bought on contract, and the [fol. 452] brokers who formed the Seattle Metal Exchange, on behalf of themselves, or clients, had the long end, that is, they represented the purchasers who had invested in silver for future delivery.

Going ahead to December, my purchases of silver on contracts or bullion outside our own market aggregated some 100,000 ounces. Future sales, for the delivery of silver, were made across the Board of the exchange. I would represent, the people I had been dealing for would represent the net short position. However, there was continuous selling by other people, either closing out, or taking profits and going back into the market. Selling would be continued by customers at all periods, at different months, and at different times. They didn't do all their selling on delivery dates. Most of them were correspondent brokers. The heavy trading was between correspondent brokers trading in their own name. You would not know whom they were selling for or buying for. This condition existed as of July 1934.

Mr. Roche's testimony that there were 1,245 contracts for the purchase of silver for future delivery of customers outstanding on the Seattle Metal Exchange as of July 25, 1934, according to my calculations made here in the Court Room are not correct. I figure in the total number of ounces committed on the market, and not number of contracts. Divide that by 500 ounces if you wanted to determine the number of contracts. Mr. Roche's figures work out around 622,000 ounces of silver. I figure about 460 to 480 thousand. These customers' contracts were represented by margins.

The background for these contracts would be the cover that I had. I based my selling contracts on the cover on the outside markets, plus profits of this market. The contracts [fol. 453] outstanding were in the names of the brokers, who were presumably handling them on behalf of customers. Contracts calling for sale of silver for future delivery, as of July 25, have been offered by myself through Pierce Lonergan & Company. Some fifty per cent of those contracts called for delivery in December. I would say 50 to 125,000 ounces were directed for delivery in September. If contracts outstanding July 25th had been kept in good standing, and the people took their silver and turned it over to the Government, they would have made about ¾ cent an ounce. The average price of the contracts on the Seattle market, for September, December and March was about 49¼.

The futures price would not necessarily be the spot price at delivery date. The spot price would differ by the condi-

tion of your liquidation of future contracts on the delivery months, and that might be under the spot price, or it might be over the spot price. You cannot assume that a portion of these people who had these 900 contracts for the purchase of silver for delivery in September would ask for delivery, because there was no such experience in the history of the world to guide you by. Suppose these people had realized a profit. It would not have come out of me. It would have come out of the people who failed to perform the contracts. The damages for failing to perform would equal the cost of performing the other contracts. Under the terms of the contract, they must take delivery, and the way they limit their liability or their losses, is by making an offsetting sale. The physical act of offering sale of these contracts originally across the board is done by myself. The parties in interest, were whoever was going to benefit on the outside. The preliminary steps were the tender on the contracts to the buying brokers, and notification that in 36 hours de- [fol. 454] livery of the silver would be made at the vaults of the First National Bank to them. The buying broker would in turn communicate to his customers. It is a seller's option. The seller would not offer the whole 125,000 ounces; he would offer five, ten or fifteen thousand ounces, say on the 2nd of the month. The broker would be notified to take 10,000 ounces delivery. The customers would say they did not want it, or they would buy what they did want. The buy broker, who would receive the tenderable notices would notify his customers. If the customer was going to take his silver, he would deposit with his broker the balance that would be due, and when the 36 hours were up, or the second day after that, the broker would present to him a safekeeping receipt from whatever bank the silver was in, the First National, and there was some at the Pacific National. I think deliveries were made against the Pacific National of Seattle.

At one time there was a switch in collateral, in which I transferred to Walsh the one hundred thousand ounces that was in New York. There were thirty odd thousand ounces melted down into 500 ounce blocks in the First National here.

I think the transfer to Walsh was made in connection with a substitution of collateral from the Pacific National Bank of San Francisco when some sullion down there was purchased.

In addition to the First National Bank of Seattle, I had no other silver. This was all held in the name of somebody else, the outside cover. That 125,000 ounces wasn't in my name. It was in the name of the First National Bank. I had other sources of delivery and arrangements were made in addition to Mr. Lamping, Mr. Piggott and Eddy and Company, to immediately purchase silver in San Francisco, as [fol. 455] had been done through the First National Bank before, and bring it up here for delivery. On the Eddy agreement, I paid 12% interest for a few months, from then on it was 7% or 8% on the loan. It was necessary to keep satisfactory collateral, 15% more than the loan.

Mr. Piggott was ready to get another $50,000 or $75,000, but he had enough for temporary cover. The correspondence between Mr. Piggott and myself was merely evidence that an arrangement had been made. Mr. Piggott left the arrangement to Mr. Arnold and me. Mr. Eddy left it to the First National Bank. Piggott was doing the same. Mr. Piggott, Mr. Arnold and I had a common understanding. I could handle it if I could show him a profit. There was no "if" to that. He would go on the deal, and Arnold would see to it that he got a profit. Mr. Piggott never acted on the deal, and I never used the $25,000 credit. There wasn't anything to use it on. He never bought any futures contract, neither did Mr. Lamping or Mr. Eddy.

I don't know whether the customers who represented these 900 contracts for the purchase of silver for future delivery had deposited margin. I certainly would not know anything about what the brokers did. I wouldn't know what Bilberg was doing in Spokane, or Ray Thompson in Tacoma. I didn't know what their margin requirements were. That would depend on the customer and the broker. I had nothing to do with that. I wouldn't know what happened to the money after the investors turned it over to the broker at all, or have any means of knowing.

Q. I have a number of checks here that have been endorsed by yourself, payable by various brokerage houses. Do you know what they represent, cancelled checks?

A. I wouldn't know the particular transactions. They all seem to come from Gill & Company.

Q. Take those particular checks. Now, as a matter of fact, Mr. Lonergan, didn't they represent the margin that was turned over to you by Gill & Company as broker?

A. I never saw the margin turned over by even the member broker.

[fol. 456] Q. Well, do you know what those checks are?

A. No, I don't.

Q. Do you recognize your endorsement on the back of these checks?

A. I presume the money was given to me for some transaction with Gill, yes.

Q. Is that your signature?

A. That one is. I presume they all are, if you say so.

Q. Well, you ought to know your own signature, I don't.

A. Well, there is one here that hasn't my signature on it (indicating).

Q. What about the others?

A. The other three are mine.

Mr. Hughes: If Your Honor please, I am going to offer that as the Government's next exhibit.

The Court: Plaintiff's Exhibit No. 90, for identification.

Mr. Luckerath: Did I understand you to say this was your signature on all of them, or one of them was not signed by you?

The Witness: One of them I don't recognize the signature. I don't think it was mine. It is my name. It may have been signed by one of the girls. Whoever signed it.

The Court: In your office?

The Witness: I don't know, Your Honor. It may have been signed in the clearing house, or it may have been signed down in my own office. I don't recognize the transaction.

By Mr. Hughes:

Q. Don't you know your own signature?

A. Well, I think I do. Sometimes I don't write very plainly.

The Court: You may inquire.

By Mr. Hughes:

Q. Well, I will ask you again if that is your signature, [fol. 457] or isn't it?

A. Yes, these three are mine.

Q. The fourth?

A. This fourth one, I don't think it is mine. It may be. It is written in pencil, and it is not very clear.

The Court: You might ask him whose account it was charged to.

Q. Those checks were all payable by Gill & Company, were they not?

A. Yes, sir.

Q. And payable to yourself or to cash?

A. Yes, sir; payable to myself or cash.

Mr. Hughes: I offer what has been marked for identification as Government's Exhibit No. 90.

Mr. Luckerath: My objection, if your Honor please, goes to the materiality—

The Witness (interposing): If you will let me see the amounts of those.

Mr. Luckerath: —which he hasn't identified.

The Witness: I can't identify the transactions. I thought I might by the amounts.

Mr. Hughes: Well, if your Honor please, I renew the offer.

Mr. Luckerath: Objected to as immaterial and irrelevant, and for the reason that it hasn't been identified.

The Court: With respect to the item objected to, as to which he said he didn't think it was his signature, what, if anything, have you to say?

Q. Which one was it that you said wasn't your signature?

A. The one in pencil. And whatever that is, it looks like the First National Bank endorsement.

Q. Well, that check is payable to yourself, isn't it?

[fol. 458] A. Yes.

Q. And when is it dated?

A. Dated the 10th day of March, 1934.

Q. And payable by whom?

A. Well, it is signed Gill & Company, Louis J. Gill.

Q. Drawn on what bank?

A. On the Bank of California.

Mr. Hughes: I renew the offer, if Your Honor please.

Mr. Luckerath: Same objection.

The Court: Overruled. Plaintiff's Exhibit No. 90 admitted.

Mr. Luckerath: Exception.

The Court: Exception allowed.

(Checks received in evidence as Plaintiff's Exhibit No. 90.)

Mr. Hughes: I ask leave of the Court to read these.
The Court: You may do so.

(Mr. Hughes reads Plaintiff's Exhibit No. 90.)

By Mr. Hughes:

Q. You don't recall what those sums or amounts were for?

A. I do not.

Q. I will ask you to state if they do not represent the margin that was turned over to you as the head of the clearing house, on behalf of Gill & Company?

A. No margins were ever turned over to me by any member brokers.

Witness (continuing): The funds for the clearing house account come from the member brokers. I don't know how the brokers kept their margins. I understand the brokers used both bank accounts and safe deposit boxes in the American Bank Building to keep their margins.

By Mr. Hughes:

Q. Now, Mr. Lonergan, I am going to hand you what has [fol. 459] been marked for identification as Plaintiff's Exhibit No. 91, and ask you to state whether the back of the various parts of that exhibit bears your signature?

A. Yes, they do.

Q. And those are what?

A. These are checks apparently drawn on the Pacific National Bank.

Q. By whom?

A. By Louis Martin & Company.

Q. And payable to whom?

A. They were payable to me, and endorsed over to the First National Bank Trust—well, one of them apparently is paid over to the First National Bank Trust Department.

Q. Do you know what those checks were for, or do you recall?

A. No, except I would presume from that endorsement to the Trust Department it was in connection with the silver that was being held down there, or it might be in connection with the payment on the purchase of Shanghai dollars, or——

Q. It didn't represent margins that were deposited by Louis Martin & Company, clearing house account?

A. No, it didn't. I mean there is nothing there to indicate it, and I wouldn't know.

Mr. Hughes: I make the offer.

Mr. Luckerath: I wish to ask the witness one question in connection with an objection to this testimony.

By Mr. Luckerath:

Q. State whether or not you made checks payable to Gill & Company and Louis Martin & Company and the other brokers from your own account to them in the course——

[fol. 460] A. Yes, there were transactions.

Mr. Luckerath: If your Honor please, I object to the materiality and relevancy of these checks. I submit it is designed to be selective of the evidence, to introduce the checks in this fashion without connecting them up with the particular transaction or without showing some other transaction that would be an offset to it. I am not familiar with these checks, but every indication would be that that is what happened, and to single out five or six checks for a number of hundred dollars on one side, without showing the item, is obviously an improper selection. Those boxes are full of checks, therefore I submit this is improper evidence, singled out this way.

The Court: Objection overruled.

Mr. Luckerath: Exception.

The Court: Plaintiff's Exhibit No. 91 admitted, and exception allowed.

(Checks received in evidence as Plaintiff's Exhibit No. 91.)

Mr. Hughes: We ask leave to read them.

The Court: You may read them.

(Mr. Hughes reads Plaintiff's Exhibit No. 91.)

The Witness: May I see those again, Mr. Hughes, maybe——

By Mr. Hughes:

Q. And again I will ask you what the consideration was for those checks, if you know?

A. Well, those would be adjustments of accounts between the two companies, and between the outside cover and their position on the Seattle market, and my position on the Seattle market.

Q. And I will ask you to state whether there were like [fol. 461] checks or like sums paid to you by P. A. Jordan & Company and the other company down there?

A. There was constantly checks moving back and forth and sums of money moving back and forth between all the companies all the time.

Witness (continuing): The explanation of Mr. Goggin's testimony that Pierce Lonergan & Company paid Goggin or the P. A. Jordan & Company the sum of $18,000, is right in the receipt itself, or on the face of it. He received that $18,000 credit on the contracts set up in the receipt, and identified. Mr. Goggin explained that to you, and so did the other brokers receive debits and their contracts back, that was in the liquidation of the clearing house.

The Clearing House very seldom had any substantial sums of cash money. They had credits, because the requirements are set up in the books so that the demand can be met instantly, but the demand is not made on the brokers as long as the brokers have confidence or know the credit position of the other broker. It is no more possible to trace the journey of a $60 margin deposit, in answer to your question, than a deposit of $60, in a commercial bank.

When it was found that these brokers were not able to perform their contracts, or offset the sales, and were not able to put up margin, then the clearing house was liquidated, and these contracts all turned back to the respective brokerage houses to which they belonged, and turned back in the same receipt, or shown on the same receipt would be the credit or debit in terms of dollars which that group of contracts was supposed to be worth, whatever the sum of [fol. 462] money mentioned on the receipt.

After August 9th, we were trying to settle between brokers and correspondent brokers, and I gave up or matched out the same as they did in New York in the settlements of their accounts. I matched out those contracts and exactly $18,000.00 was matched out with it. If those contracts were enforced against those customers, those customers would be liable for $18,000.00. It represents a credit transaction, and the return of the contracts from the Clearing House to

the broker, and the giving up of these contracts by the Clearing House.

I received no salary, I had an expense account which came from my profits. I don't know what Mr. Goggin received. When Mr. Goggin came up I promised to put enough business through his office so he could get $125.00 a month, I think it was. The Pacific National Bank of San Francisco was worth many thousands of dollars, if the business continued.

The expenses of renting offices, hiring stenographers, bookkeepers and telephone exchange would be paid according to whose expense it was, and who incurred the obligation. I have my own brokerage office, a small office for which I paid $15.00 a month. I had a part time stenographer and a branch telephone. My expenses were paid by myself out of my own concern.

The customer's commission which a broker received was used by the broker in his business. Commissions paid by the correspondent broker vary depending upon the private [fol. 463] deal between the correspondent broker and the member broker. I do not know what the deal was. Most brokers operate on whatever income they receive from the stocks and bonds they sell. The Chicago Board of Trade and Commodity Exchanges in New York operate on income received from dues or fees charged the members and assessments on membership accounts. On the Seattle Exchange 50¢ on each contract trade went to the Exchange, and part of it to the Clearing House. There was no other source of revenue. Assessments upon members made up the balance of exchange expenses.

My transactions on the account of Piggott were not on the strength of the letter, but on the strength of my deal with him, and my arrangements with him. The Piggott contracts are not contracts because they have never been consummated. They are bids and offers, which we attempted to make into contracts. We operated under the rules and regulations basic-ly the same as those of the commodity exchange of New York.

Redirect examination:

Mr. Walsh handled entirely the details and the funds of the Seattle Clearing House. The margins from brokers paid in connection with the Clearing House was paid to Mr.

Walsh. There were many occasions during the period of operation of the exchange when members and exchange houses had to pay or settle obligations, and the conditions between the brokerage houses where every member broker of the exchange had occasion during the operations to make checks payable to others and to correspondent brokers. The [fol. 464] funds flowed back and forth all the time. They might pertain to a spot transaction, to a balance for an outside contract, which had been assigned to another broker, as in the case of the 100,000 ounces assigned to Walsh. They might be balances from a futures contract position, they might be a loan. I would not be able to tell.

Defendant's Exhibit A-47 is the Seattle assay returns of *of* silver which I delivered to them about August 20th, by reason of the fact that there were no contracts in good standing that I was under. I turned in the last of the silver to the Government, which had been down at the First National Bank for eight or ten months. This list (witness indicates) comprises some $16,000.00 worth, and would represent about 33,000 ounces of silver. It was part of the silver that was held under the Eddy account.

(Defendant's Exhibit A-47 received in evidence.)

Mrs. Bollong who deposited some $450.00 in escrow in a certain bank did not receive her silver because this Government case was pending, and the obligations of Louis Martin Company to their customers cannot be determined. This holds true with all who deposited the balance of their contracts. There are assets in Louis Martin Company sufficient to pay three or four times its outstanding obligations. These assets consist of book accounts, money due, over all it owes anyone else.

(Witness excused.)

[fol. 465] Upon Motion of defendant and pursuant to stipulation heretofore entered between counsel for the Government and counsel for the defendant, Lonergan, the deposition of COMPTON I. WHITE was read into the evidence, which deposition was in substance as follows, in reply to direct interrogatories:

My name is Compton I. White, residence Clarke Fork, Idaho. I am a member of the United States House of

Representatives. During the last two sessions of the United States Congress I have been a member of the standing committee on Public Lands, Irrigation and Reclamation and Coinage, Weights and Measures Committee of the United States House of Representatives, and have been a member of the Coinage, Weights and Measures Committee on legislation affecting the purchase of gold and silver during the last two sessions of Congress.

I am familiar with the conditions that resulted from the enactment of the Silver Purchasing Act of 1934, and with the activities of the United States Treasury through its agents or representatives, acting under and by authority of the Silver Purchasing Act of 1934, in regard to the purchase of silver bullion in New York City, New York. The United States Treasury, its agents or representatives made purchases of silver for future delivery in New York, acting under and by authority of the Silver Purchasing Act of 1934. These activities had the effect of stabilizing and maintaining the price of silver bullion and contracts for silver, and prevented a price decline of the metal.

These activities took place subsequent to the 1st of May 1934 and up to August 9, 1934. The effect of these activities of the Treasury, its agents or representatives in carrying [fol. 466] out its silver purchasing program was to stabilize the price of the metal and maintain the price of silver contracts calling for future delivery on the commodity exchange in New York City during the liquidation of these contracts.

The testimony of the witness in reply to the Cross-interrogatories was in full substantially as follows:

I have not been a member, official, or employee of the Department of the United States Treasury, or of the Commodity Exchange Incorporated of New York, during the months of June and July, 1934.

I have the records of the details as to date and amount of silver sold by myself as Manager of the Whitedelf Mining Company. 1,282 ounces were sold at 46.425 cents per ounce, previous to the President's Proclamation, and 1,811.09 ounces after the President's Proclamation, setting the price at 64-1/8 cents per ounce. It is not a fact that my answers to the interrogatories *pur*pounded by the defendant are based upon belief and not upon personal knowledge of the transactions testified to. My knowledge is based on in-

formation gained as a member of Congress, and as a member of the standing and special Committies of Congress, particularly interested in the Government's policy in dealing in silver.

From time to time I have attended conferences with Representatives of the United States Treasury Department, including the Secretary of the Treasury, Morgenthau. When the Government's silver program was considered, the information supplied me was privileged to a member of Congress, and of a confidential nature.

Defendant rests.

[fol. 467] Rebuttal

Testimony of Gus E. Ledbetter, called as a witness on behalf of the plaintiff in rebuttal.

Direct examination:

My name is Gus E. Ledbetter. I am manager of E. A. Pierce & Company; E. A. Pierce & Company is a member of the commodity exchange of New York. I have been employed by E. A. Pierce & Company about thirteen years; it is one of the leading firms. I am familiar with the rules and regulations of the commodity exchange of New York, and with the Chicago Board of Trade. E. A. Pierce & Company operate under certain rules and regulations in dealing in futures commodities. I have had no experience in trading on the floor of any exchange. I have never heard the term "street name" or "street account."

Cross-examination:

E. A. Pierce & Company have sixty-five officers altogether. I do not know that the Kansas City offices or the other offices are conducted just the same as my two offices. I am not a member of the firm; we have no stockholders. Mr. Woods advised me in 1931 that he wanted to extend the silver futures activities in our different branch office on the Pacific Coach.

(Witness excused.)

WILLIS L. CAMPBELL, (Recalled on rebuttal).

Direct examination:

My name is Willis L. Campbell; I am a resident partner of Dean Witter and Company, brokers. I have charge of two Seattle offices and one Tacoma office. I am familiar with the practices that obtain upon the commodity exchange in New York and also the Chicago Board of Trade. I have never heard of a street account.

(Witness excused.)

[fol. 468] Mr. Hughes: That is all the rebuttal.

Government rests.

The defendant rests.

(Jury Absent)

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Whereupon defendant moved, the evidence being closed that a verdict of Not Guilty be directed by the Court as to each of the remaining Counts of the Indictment, to-wit:

Counts 1, 2, 3, 4, 5, 6 and 8 and the case be taken from the jury on the ground of the insufficiency of the evidence, and that the same be dismissed on the ground that there is no competent evidence that connects the defendant with the offense as charged thereunder, and for the further reason that there is no proof of any mutual scheme between Mr. Lonergan and Mr. Walsh.

The motion was denied.

Exception taken.

Exception allowed.

Thereafter argument of respective counsel took place.

Whereupon the Court instructed the jury, as follows:

[fol. 469] INSTRUCTIONS OF THE COURT

The Court: Members of the jury, you have heard the testimony and the arguments of counsel. After the court instructs you, you will retire to the jury room to consider your verdict.

Instruction Number I

The indictment in this case was returned under Section 338, Title 18, United States Code, which, as far as material in this trial, reads as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice, or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, * * * in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, * * * shall be punished as therein provided."

The indictment charges that Pierce Lonergan and John R. Walsh violated this law by devising a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises and using the mails to further the same, in the operation of the Seattle Metal Exchange and the [fol. 470] Seattle Silver Market. The defendant Walsh has entered a plea of *nolo contenders*, and you are not concerned with him. Your verdict will be as to the defendant Pierce Lonergan alone.

The indictment charges that the defendants operated the Seattle Silver Market under the names of Pierce Lonergan and Company, Lewis Martin and Company, Gill and Company, and P. A. Jordan and Company; that they represented these firms to the public as silver brokers of financial responsibility and standing, worthy of the confidence of investors, and well qualified and in a position to advise investors regarding investments in silver and silver futures, when in fact the defendants and their firms were not brokers of financial responsibility and standing, but were impecunious, financially irresponsible, and without resources or ability to fulfill their commitment and without qualification to advise anybody regarding investments of any sort.

And for the purpose of inducing the investors to open accounts with the defendants and their concerns and pay over their money to them on contract for future delivery

of silver, it is charged that the defendants would pretend and represent that the Seattle Silver Market was entirely reliable and responsible, and functioning in connection with the great silver markets in New York, London, Shanghai, and Bombay, and with prices in silver following such markets; but the prices on the Seattle Silver Market could not break substantially below such world markets because in an emergency the other world markets would come to the support of the Seattle exchange; that the small investors would trade more advantageously at Seattle than on the New York market because they could here purchase silver [fol. 471] in smaller lots; that the price of silver was certain to advance and that investors ought to buy silver as a protection against inflation; that all the money paid by investors on margin contracts was either used to purchase silver for future delivery on investors contracts or was held in a special clearing house fund until required in settlement of the contracts; and finally, that any investment in silver through the defendants and their firms would be absolutely safe for the investors.

All of these representations and promises are alleged to have been false and misleading.

The Seattle Silver Market as operated by the defendants is charged to have been unreliable and irresponsible, not functioning in conjunction with the silver markets of the world, but controlled by the manipulations of the defendants and their accessories. Acceptance of subscriptions for small amounts of silver it is charged, was only for the purpose of enticing small and inexperienced investors into speculative trading and futures and enticing them to pay over their money to the defendants; and the funds received by the defendants it is alleged, would not all be used for the purchase of silver or covered into a special clearing house trust fund for future settlement with investors, but would be appropriated and consumed by the defendants in their operations and so lost to the investors. It is further charged as a part of the scheme and artifice that when the defendants should reach a point in their operations where they could no longer conceal their shortages they would take steps deliberately and fraudulently to depress the price of silver on the market far below the legitimate price and [fol. 472] would demand of investors large additional sums of money on their margin accounts, well knowing that most

of the investors would be unable to comply with such demands, and so would have their activities wiped out and the defendants so be able to close out all except a very small number of the investors.

After so describing the scheme and artifice to defraud in count I, the indictment charges that, for the purpose of executing the same, and attempting to do so, the defendants caused to be mailed in the Post Office at Seattle a letter dated December 16, 1933, addressed to Mr. Frank Givens, Port Orchard, Washington. That completes count I. There are nine additional counts, each of which adopts by reference the description of the scheme as set forth in the first count, and then sets out a letter alleged to have been mailed, or caused to be mailed by the defendants at Seattle in furtherance of the scheme. However, three of the counts, namely counts VII, IX and X of the indictment, have been dismissed. You will therefore not consider those three dismissed counts, but will consider the remainder of the counts of the indictment.

To the indictment, and to each and all the counts thereof, the defendant on trial has entered a plea of not guilty. This plea of not guilty puts in issue every material allegation of the indictment and each count thereof on which defendant is being tried, and casts on the government the burden of proving the guilt of the defendant by the evidence beyond a reasonable doubt. The defendant is not called upon to disprove the charges of the indictment, nor to prove his innocence.

[fol. 473] Reference has been made in the case to the fact that the defendant John R. Walsh has heretofore entered a plea of nolo contendere. This plea is different from a plea of guilty and is a Latin term meaning that the defendant does not contest the case. The fact that the defendant Walsh has entered that plea raises no presumption as to the guilt or innocence of the defendant on trial.

The defendant Walsh is not on trial before you and you will give no consideration to the question of his guilt or innocence. You are concerned only with determining the innocence or guilt of the defendant Lonergan, who alone is on trial before you.

The indictment is merely the paper charge and formal accusation against the defendant, which he has had no opportunity to answer until this trial, and the indictment is

not to be considered by you as evidence in any sense against the defendant, and the fact that the indictment has been returned by the grand jury is not to be considered by you in any way as evidence against the defendant of the truth of what it states. The burden is always on the government to prove the defendant guilty by competent evidence beyond a reasonable doubt, and that burden must be successfully met by the government before you can convict the defendant.

In this case you must consider separately each and every count of the indictment on which defendant is being tried. As to those counts, you must decide the guilt or innocence of the defendant as to each and every count separately, and if you have a reasonable doubt under the evidence of any material allegation of the particular count of the indictment you are considering, it is your duty to acquit the de-
[fol. 474] fendant as to such count; but if you have no such reasonable doubt concerning any such allegation it is your duty to convict on each count as to which under the evidence you have no such reasonable doubt.

In this case in substance it is charged that the defendant on trial and another man, and each of them, devised a scheme and artifice to defraud and used the United States mails in furtherance of that scheme in violation of what is known as the mail fraud law. Regarding its formation, such a scheme may be devised by one or more persons. A necessary element of such a scheme is fraudulent intent. In order for such a scheme to be devised, it is necessary that the one or ones devising it intend to defraud others by carrying this scheme into effect.

Instruction Number II

The offense of violating the law here involved consists of two parts—first, the devising or intention to devise a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations and promises; and second, the placing or causing to be placed in the United States Post office a letter intended to further such a scheme. Fraud alone as operated against the public is not punishable under a federal law. It is only when the mails are used in some way in connection with such fraud that it may become punishable. Congress has declared that the mails must not be used in

any wise to further fraud or deception for the purpose of obtaining from others their money or property. Where a scheme to defraud, or for obtaining money or property on [fol. 475] false representations and promises has once been established, each letter mailed in furtherance thereof becomes an offense, and an indictment could charge as many counts as there are letters mailed for such purpose, but the indictment in this case charges only ten counts and three of them are withdrawn from your consideration as above stated, leaving seven of those counts for your consideration.

Instruction Number III

The defendant on trial, as well as every defendant in a criminal case, is presumed innocent of the charges contained in the Indictment until he is proved guilty by the evidence beyond a reasonable doubt, and this presumption is one of his important rights, not to be ignored or lightly considered either by the Court or by the jury. It is one of the important rights which the law accords all persons accused of crime. It attaches to them and continues with them throughout all stages of the trial and throughout all stages of your deliberations until it has been overcome by the competent evidence in the case, and until the guilt of a particular defendant has been established by the evidence beyond a reasonable doubt, notwithstanding the presumption of innocence with which the law clothes all accused persons. This applies to the defendant on trial here. And by the expression "reasonable doubt" is meant in law, just what those words in their ordinary and every day use imply; they have no technical or legal meaning different from their ordinary meaning. A reasonable doubt is a doubt which is based upon reason or is a doubt that is not unreasonable, and not merely imaginary or capricious. It is such a doubt, as, if entertained by a person of ordinary [fol. 476] prudence, sensibility and decision, he would allow to have influence him in transacting the graver or more important affairs of life, causing him to pause and hesitate before acting thereon. It must be a real and substantial doubt and it must rise out of the honest minded, common sense consideration and application of the evidence in the case or from lack of evidence in the case.

If from a fair and candid consideration of all the evidence you can say upon your oaths as jurors that you have

an abiding conviction of the truth of the charge to a moral certainty, then you have no reasonable doubt and should convict. If you have no such moral convictions, or if you entertain doubts for which sane and satisfactory reasons can be assigned in your minds, you must give the defendant the benefit of that doubt and find him not guilty.

Instruction Number IV

If upon a fair and impartial consideration of all of the evidence in this case, you should find that there are two reasonable theories supported by the testimony and that one of such theories is consistent with the guilt of the defendant, and the other of such theories is consistent with his innocence, then it is the policy of the law, and the law makes it your duty, to adopt the theory which is consistent with the innocence of the defendant, and in such case to find him not guilty.

Instruction Number V

There is no duty or burden resting upon the defendant to prove his innocence. If you find from the evidence that [fol. 477] some fact or circumstance is not clear to you which fact or circumstance might have been testified to by the defendant or could have been cleared up by other evidence or testimony produced by the defendant, that nevertheless did not impose upon the defendant the duty of producing such evidence or testifying.

Instruction Number VI

This indictment in its several counts charges the same artifice or scheme for obtaining money or property by means of false and fraudulent representations, pretenses, and promises, and in addition thereto each of such counts alleges that the defendant after having so devised and intending to devise such scheme and artifice, placed, or caused to be placed, in the post office of the United States, to be sent and delivered by the post office establishment of the United States, certain mail matter, for the purpose of executing such artifice or scheme. So that these counts after the first one contain nothing new or different from the first one except the particular letter or mail matter alleged to have been placed, or caused to be placed, in the post office in execution of such artifice or scheme. When you take the

counts up one by one, the first question is do you find that the artifice or scheme alleged was actually devised or intended to be devised by the defendant as charged. If you do not find that the defendant devised or intended to devise such scheme or artifice as charged, the placing or causing to be placed of any alleged letter or mail matter by the defendant would not constitute an offense under the law. The mere placing or causing to be placed of any letter or circular, charged in any of the counts is not an offense under [fol. 478] the law, unless it was done for the purpose of executing an artifice or scheme devised or intended to be devised as alleged in the first count.

Instruction Number VII

If you find from the evidence that defendant exercised good faith in the doing of the acts detailed by the evidence introduced upon the trial herein, then such good faith on the part of the defendant will entitle him to an acquittal at your hands, for it is the law that good faith is a complete defense to charges such as are alleged in this indictment, no matter how unfounded, chimerical or impractical the defendant's acts, statements and beliefs may have been.

Instruction Number VIII

You are further instructed that fraud is never to be presumed but is always a question of fact and must be proved by the prosecution by clear, cogent and satisfactory evidence convincing you beyond a reasonable doubt of the existence of such fraud as is alleged in the indictment and further that such fraud was a part of the scheme or artifice specifically alleged in the indictment herein.

Instruction Number IX

The intent to defraud in this case is a question of fact and is not a question of law and as such question of fact must be found by you to be proved by competent evidence in this case beyond a reasonable doubt and to a moral certainty before you are justified in finding the defendant guilty.

[fol. 479] Instruction Number X

You are instructed that the burden is upon the prosecution to prove affirmatively either by direct or circumstantial

evidence, that the act or acts done were so done with specific intent to violate the laws of the United States as charged in the various counts of the indictment.

Where one in ignorance or mistake of fact commits an act which but for such mistake would be a crime, there is an absence of the malice or criminal intention which is an essential element of the crimes alleged in the indictment herein, and therefore, if you find that defendant acted in ignorance or mistake of fact, defendant is exempted from criminal responsibility in this case.

Therefore, if you find from the evidence or entertain a reasonable doubt as to whether or not defendant acted in ignorance or mistake of fact in the matters charged in the indictment, you must acquit him.

Also it is the law that one who without guilty knowledge lends his aid to a fraudulent scheme already afoot or in process of formation is guilty of no offense. Even though defendant is shown by the evidence to have been careless and negligent in the management of his affairs, he cannot be guilty of the fraud charged without conscious participation in such fraud, if any fraud you find.

Instruction Number XI

No matter how visionary or impractical the business venture of defendant in this case may have been, he cannot be adjudged guilty of any of the offenses charged unless you [fol. 480] find from the evidence, beyond a reasonable doubt, that the defendant formed a corrupt intent and devised a scheme or artifice to defraud the individuals, referred to in the respective counts of the indictment, of their money or property in the manner alleged in the several counts of the indictment and further that he used or caused to be used the Mails of the United States in the execution of and in furtherance of such scheme or artifice to defraud.

Instruction Number XII

"This is a criminal case, and the false representations" if made as charged, "must have been knowingly false or made with reckless disregard as to whether they were false or true," in order to come within the prohibition of the statute.

Instruction Number XIII

The indictment in this case charges that the defendant "wilfully" and "unlawfully" did the acts and things al-

leged in the indictment. In this connection, you are instructed that there is a very real and vital difference between simply doing an act and doing an act wilfully. In the first case no bad intent or purpose is involved, while in the second case of "wilfully" doing the act the elements of guilty knowledge and bad purpose are involved and constitute the gist of the offense.

The use of the word "wilfully" in an indictment implies not merely "voluntarily" but also an evil intent and bad purpose to do wrong.

So that in this case, even though you should be convinced [fol. 481] beyond a reasonable doubt that the defendant committed the acts and things alleged in the indictment, before you can find the defendant guilty as charged, you must also find from the evidence beyond a reasonable doubt that the acts and things done by the defendant were actually done by him wilfully and with an evil intent and bad purpose to do wrong.

Instruction Number XIV

You are instructed that matters of fact, if any, which are left uncertain by the evidence cannot be made certain to the prejudice of the defendant, by inference. In the absence of evidence, no inference can be drawn by the jury against the defendant, but on the contrary all the inferences and presumptions consistent with the facts proved are to be drawn and indulged in favor of the innocence of the defendant. No fact or circumstance upon which you may base a conclusion of guilt is sufficient unless such fact or circumstance has been proved beyond a reasonable doubt and to the same extent as if the whole conclusion depended upon that one fact or circumstance.

Instruction Number XV

You have a right to consider in determining the intent of defendant the fact that he consulted exchange experts and reputable attorneys before he sold any of the commodity in this case.

Instruction Number XVI

Statements or representations as to future or contingent events or as to expectations and probabilities of what will [fol. 482] be, or is intended to be, done in the future, or mere expressions of opinion about what will occur in the

future or as to results of what will be anticipated in the future from present existing conditions, if made in good faith, do not constitute fraud, even though they turn out to be false. In other words, mere expressions of opinion or mere promises or conjectures are not and cannot be the basis of fraud, unless made with an intention to mislead or deceive.

Instruction Number XVII

It is a matter of common knowledge that salesmen generally give glowing accounts and made some exaggerations and some predictions with respect to the wares they sell. This is sometimes called "Puffing". You are instructed that mere "Puffing" is not equivalent to the making of a false representation of fact, and that any prediction as to the future or any glowing statements of future possibilities or statements the truth as to which is known or available to the person hearing such statement, are not, and cannot be the basis of a representation of an existing fact and no fraud can be based or predicated upon such predictions, hopes or beliefs.

Instruction Number XVIII

It is possible to understand now, after a period of years, that some of the promises which defendant may have made were too optimistic, but the defendant's motives and intentions are to be judged by the known facts and circumstances existing at the time the representations and promises were alleged to have been made, and are not to be judged by facts and conditions as we now know them to be after such a lapse [fol. 483] of time.

Instruction Number XIX

Mere loss by investors of money in a commodity investment does not alone spell criminality on the part of those selling the commodity. The law does not intend to punish except where the evidence shows a definite mental intent to defraud. Mistakes of judgment, improvidence, unwisdom, lack of foresight, and economic conditions do not make and do not indicate criminal intent.

Instruction Number XX

And the mere fact that persons who entered into contracts with brokers may have been shown to have lost money, is not

of itself such evidence as is sufficient or proper to cause you to find the defendant guilty. Success or failure in making a profit or loss has of itself no bearing upon the guilt or innocence of the defendant. A man is not to be held criminally liable for success or failure, and even though you should find that the defendant was careless and negligent in the conduct of his business, that is no ground for finding him guilty of a criminal offense, but in order to do so you must be convinced beyond a reasonable doubt that his acts were prompted by malicious, wilful and wrongful intent to commit an illegal fraud upon those named in the indictment.

Instruction Number XXI

In weighing the evidence you have, on the one hand, on behalf of the government, witnesses, some of whom claim to have sustained losses by reason of the purchase of silver futures. You will take into consideration their interest or [fol. 484] lack of interest in the result of this controversy, and, likewise, their demeanor and manner upon the witness stand and all and every circumstance disclosed by the evidence which would bear upon the credibility of these witnesses. You will apply this test also to the testimony of the defendant and all the witnesses who have testified upon the trial.

Instruction Number XXII

Unless you are convinced by the evidence beyond a reasonable doubt that the defendant either personally directed or ratified or caused the mailing of the letters referred to in the various counts of this indictment, even though you should find the fraudulent scheme alleged in this indictment existed, such letters are not to be considered against the defendant Lonergan.

Instruction Number XXIII

Conversations had between particular salesmen or brokers and purchasers, regardless of the nature of such conversations not had in the presence of the defendant, Pierce Lonergan, are not binding upon him, unless you find that defendant actually authorized the one making the particular misrepresentations, or ratified them afterwards. The authority to make representations to be binding upon the defendant must be based upon evidence beyond a rea-

sonable doubt showing such authorization, or showing a ratification of the misrepresentation, and the authority cannot be based upon mere presumption or doubtful inference or guess work.

Instruction Number XXIV

[fol. 485] If you find from the evidence that isolated salesmen at various times may have made what, in your judgment, amount to misrepresentations were not made pursuant to the orders of defendant or pursuant to any general scheme to defraud devised by the defendant as charged, or in pursuance of any general plan or idea agreed upon devised by the defendant, but were mere isolated incidents made without actual authority of defendant and not ratified by the defendant, then you must, even though you find said misrepresentations to have been made in isolated cases, find the defendant not guilty of having made such misrepresentations.

Instruction Number XXV

If you find that the defendant Pierce Lonergan participated in the conduct of the business of the Seattle Metal Exchange or the Seattle Metal Exchange Clearing House Association, or Pierce Lonergan & Co., and that in the participation of the conduct of said businesses, or any of them, he employed or authorized the employment of salesmen, nevertheless he had a right to himself employ or cause to be employed such salesmen, but the mere fact that he did employ or caused to be employed such salesmen, and the mere fact that salesmen may have made misrepresentations; would not bind defendant Pierce Lonergan unless you find from the evidence beyond a reasonable doubt and to a moral certainty that the salesmen were in fact authorized by Pierce Lonergan to make the false and fraudulent representations alleged, or that defendant ratified such statements.

Instruction Number XXVI

[fol. 486] The law gives rise to a presumption that parties in their business relations are always prompted by honest motives. You will accord to the defendant herein the benefit of such presumption until it is overcome by evidence convincing you beyond a reasonable doubt and to a moral cer-

tainty, that defendant is or was not prompted by such honest motives.

Instruction Number XXVII

Men, in transacting their business, are normally motivated by the desire to make profits. If you find from the evidence that the defendant by the decline in the price of silver futures lost profits which he would have otherwise made, then I charge you that you may consider such fact in determining whether he did in fact cause such decline in the silver futures price since a man normally would not cause a price to decline where the result of such decline would mean great financial loss to him.

Instruction Number XXVIII

The mere fact that the defendant sold silver futures with a view to making profits in such sale, even though such profits which he had hoped to make were large, would not alone establish the fact that there was fraud in his sale of silver futures. Profits are the normal expectancy of business and the defendant is entitled to legitimately seek profits as the expected results of his business venture.

Instruction Number XXIX

Whenever the public has the right to place bids and offers [fol. 487] in competition with others, whosoever the others may be, then, in such case, there is not and cannot be a rigged or manipulated market. You are instructed that there the market is free and open,—and by free is meant that opportunity is given the public to have executed their orders through broker members of the particular exchange in competition with orders of others, and by open is meant that the transactions on the exchange are conducted openly so that all broker members may be advised of the bids and offers and given the opportunity to place other bids and offers in competition,—there cannot in such case be a rigged or manipulated market. You are instructed that the defendant had the right at all times to in good faith offer silver futures for sale at the market or any price at which he saw fit in a free and open market such as I have heretofore described to you. You are instructed that it would only be natural for the distributor of silver futures by means of transactions on an exchange to handle a large

volume of business by reason of the fact that he was such distributor, and no inference of wrongdoing or fraud may be indulged in by you against the defendant by reason merely of the volume of his transactions.

Instruction Number XXX

You are instructed that there is nothing unlawful in the maintaining in good faith by any person or firm of bids to buy and offer to sell a particular commodity on any exchange, and that this is a regular and customary practice not denounced by law.

Instruction Number XXXI

The selling or trading in good faith in silver futures or sil- [fol. 488] ver for future delivery through a silver futures exchange or through selling brokers, members of a silver futures exchange, is a legitimate and perfectly proper business, regardless of what any of you jurors might feel on that subject. Insofar as the defendant is concerned, in connection with his participation in the affairs of any transaction of the Seattle Metal Exchange or of the selling broker members of the Metal Exchange, you are instructed that he had a right to engage in good faith in the conduct of said business, and that said business if conducted in good faith is of itself, legitimate and proper, and that representations or statements made by the defendant, or authorized by the defendant, he believing such statements or representations to be true, cannot be the basis of criminal responsibility.

You are further instructed in this connection that the law presumes that the conduct and operation of such a business is legitimate and proper and such presumption remains until such time as proff beyond a reasonable doubt to the contrary is established by competent evidence properly admitted on this trial.

Instruction Number XXXII

"The fact that contracts are satisfied by way of set-off and payment of differences detracts in no degree from the good faith of the parties, and if the parties know when they make such contracts that they are very likely to have a chance to satisfy them in that way and intend to make use of it, that fact is perfectly consistent with a serious business purpose and an intent that the contract shall mean what it says".

Instruction Number XXXIII

[fol. 489] A "wash sale" is defined as a transaction in which there is no passing of the beneficial title. It is a representation of a transaction passing title to property in the present from an anonymous or fictitious seller to a buyer.

Instruction Number XXXIV

If from the evidence you find that the defendant believed in good faith that the price of silver futures would advance and that the manipulation of the United States Government would have the effect of increasing the price of silver by an inflationary program or by fixing of silver prices, and if you further find that the defendant so believing advised or authorized representations to purchasers of silver futures, that by reason of such monetary policy or inflationary program the price of silver futures was bound to rise, then you are instructed that he had the right to so advise or authorize such representations to prospective purchasers of silver futures, and he is not to be held criminally liable for any representation as to the future price of silver futures based on said situation and made in good faith.

Instruction Number XXXV

I instruct you that on the 19th day of June, 1934, the Congress of the United States passed a law known as the Silver Purchasing Act. Among other things this law amended the Stamp Act provisions of existing law to provide a transfer tax on silver equal to 50% of the difference between the cost to the transferor, plus allowed expenses, and the price received by him. This fact should be considered by you in connection with all the other evidence introduced in this case, and you should consider, along with all the other evi- [fol. 490] dence in the case, the testimony as to the effect of that transfer tax on the silver and future markets and you should consider the testimony concerning that transfer tax on the question of defendant's guilt or innocence in this case.

Instruction Number XXXVI

That Silver Purchase Act of June 19, 1934, also empowered the President of the United States, by executive order, to require, within ninety days, the delivery to the mints of the United States, of all silver situated in the continental

United States. Such a proclamation was issued by the President of the United States at three minutes past twelve on August 9, 1934, and you should consider, along with all the other evidence in the case, the testimony as to the effect of that proclamation on the silver and silver futures markets and you should consider the testimony concerning that proclamation on the question of defendant's guilt or innocence in this case.

Instruction Number XXXVII

The fact that a number of witnesses have attended this trial who have come from distant parts of the United States at the Government's expense, is not of itself a circumstance which can be considered by you in any manner or in any way attaching any inference of guilt to the defendant.

Instruction Number XXXVIII

You cannot presume certain conclusions based in whole or in part upon another presumption or as it is sometimes stated there can be no presumption resting or founded upon another presumption nor can there be an inference [fol. 491] created by another inference.

Instruction Number XXXIX

In this case evidence of good character has been introduced in behalf of the defendant, and I instruct you that the purpose and function of such evidence is to raise a reasonable doubt, and that it is entitled to be considered by you whether the effect of the other evidence in the case is clear or doubtful, and if after you have considered it in connection with the other evidence in the case it creates a reasonable doubt in your minds as to the defendant's guilt, then it is your duty to acquit him.

Instruction Number XL

The main questions presented for consideration in this case are as follows:

First. Did the scheme alleged in this indictment in fact, exist?

Second. If such scheme existed, were the United States mails used in furtherance thereof?

Third. If you find that such scheme existed and the mails were used in furtherance thereof, was the defendant, Lonergan, a party to such a scheme?

The duty of the Government, before it can properly demand a verdict of guilty at your hands as to the defendant Lonergan, on any of the counts charged in the indictment, must be fulfilled by satisfactorily proving to you beyond a reasonable doubt each of these three propositions. If it fails in satisfactorily proving any one of these three propositions as to any one of the counts charged in the indictment, then you cannot convict on such count or counts [fol. 492] whereof there is such failure of such proof. That is, if the proof is found by you to establish the existence of the scheme charged in the indictment, and not of the use of the mails in furtherance thereof, or if such proof shall establish the use of the mails but shall not establish beyond a reasonable doubt the existence of the scheme, or if such proof shall establish the existence of the scheme and the use of the mails in furtherance thereof, but does not satisfactorily prove to you beyond a reasonable doubt that the defendant Lonergan was connected with the scheme as charged, then the Government has not fulfilled the requirements of the law as to proving guilt of the defendant Lonergan, as you would not in such case find any one of these three propositions established against said defendant Lonergan beyond a reasonable doubt, and in such case your verdict must be not guilty.

Instruction Number XLI

It is not necessary that the letter or other article of mail matter charged as mailed in furtherance of a scheme to defraud, itself be objectionable. It may be perfectly innocent on its face and may contain no misrepresentation or deception, but if it is mailed in connection with and to aid a scheme to defraud or a scheme for obtaining money on false representations and promises, the offense prohibited by the law is thereby completed.

Instruction Number XLII

It is not necessary that the objectionable matter be mailed by the defendant personally. The act of mailing [fol. 493] may be performed by a perfectly innocent agent. The defendant would be guilty if he devised or helped de-

vise the unlawful scheme and caused the innocent agent to place the matter in the post office in furtherance thereof. He would be responsible if the matter was placed in the mail in the ordinary course of business as a natural and probable consequence of the plan or scheme that had been devised, and for the purpose of forwarding the same. If there is in operation such a scheme, any defendant consciously and knowingly cooperating therein is responsible for the mailings although he may not have known of the particular act.

Instruction Number XLIII

The question before you is whether the defendant Pierce Lonergan devised or helped to devise and plan such a scheme or artifice to defraud as is charged in the indictment. Whether he did so or not is a question of fact for you, the members of the jury, to determine from the evidence that has been presented to you in the cause. In order to prove such a scheme, it is necessary for the Government to prove beyond a reasonable doubt at least some of the material misrepresentations and false promises alleged in the indictment. It is not necessary for the Government to prove all the misrepresentations or all the allegations of fraud charged but there must be sufficient proof to convince you beyond a reasonable doubt that the scheme and artifice charged in the indictment actually was in operation and that the defendant knowingly participated therein.

Instruction Number XLIV (44)

In considering whether the defendant Lonergan intended [fol. 494] to mislead and defraud the investors, you should study all the circumstances, and all the acts performed by him, as shown by the evidence admitted before you. There has been testimony as to money solicited on promises of profits of three per cent a month; there has been testimony that the safety of the principal would be guaranteed and that the money paid over by the investors would be kept in a clearing house fund; there has been testimony regarding dummy accounts and transactions alleged to have been made by the defendant through such dummy accounts and street names; there has been testimony regarding the creation of the market price of silver futures or silver for future delivery on the Seattle market during the last few

days of July and early in August of 1934, and of statements and representations made by the defendant Lonergan and by Walsh in explanation of such creation. All such testimony is to be considered by you fairly and fully, and it is for you to determine first whether such representations and promises and such acts were actually made, or caused to be made by the defendant Lonergan, and if so made, whether they were made honestly, whether he himself believed them and made them in good faith, or whether they were made for the purpose of misleading and deceiving.

Instruction Number XLV (45)

Fraudulent intent is the gist of the offense under the mail fraud law. Men may not be convicted for acts done in good faith. The defendant is not on trial for devising an unsuccessful or impractical scheme even though you may find that the plan in this case was impractical and unsuccessful, nor is he on trial for errors of judgment, but the intent is fraudulent within the meaning of the law when [fol. 495] there is the design and purpose to use deception, trickery or false representations and promises to obtain from another his money or property.

Instruction Number XLVI

False and fraudulent pretenses, representations and promises mean false and misleading statements and pretenses regarding present or past facts and conditions which the person making them knows to be untrue. Intentional omissions of fact required to make statements convey the true meaning and impression are likewise fraudulent. False promises are promises and expressions of opinion regarding the future not made in good faith but with the intention to mislead. The law includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.

Instruction Number XLVII

It is also a principle of law that careless and reckless statements, made without regard to whether they are true or false, and put forth without reasonable basis and for the purpose of obtaining from another his money and property, are equivalent to fraud. A person who makes a statement of

fact as of his own knowledge, with the intention that it shall be acted upon, is presumed to know whereof he speaks. So an expression of opinion which the person making it does not actually hold is a false representation.

Instruction Number XLVIII

A plan or scheme may be seemingly fair and honest, but if [fol. 496] the purpose is to deceive and defraud, it is in violation of the law. There can be honest though mistaken judgment of the future from existing conditions; even sincere but visionary optimism is allowable; but there can also be alluring suggestions and predictions of what will come to pass, put forth without reasonable warrant and with a fraudulent intent to profit by inducing belief and reliance among credulous and uninformed.

Instruction Number XLIX

In order to constitute the offense charged in this case, it is not necessary to show that the defendant intended to defraud every person with whom he had dealings, or that the entire business was a fraud. Neither is it necessary to prove that the scheme or artifice was developed at one time. It may have been formed gradually, but in order to constitute the scheme as charged, it must have been formed prior to and have been in existence at the time of the mailing of the letters basing the counts on which a verdict of guilty may be found.

Instruction Number L

You are instructed that in a criminal case a principal is not responsible for offensive acts committed by his agents or by others unless he authorizes or sanctions them or tacitly condones them while the results of their activities flow in for his benefit. But if the principal cooperates, condones misrepresentation and deception, and with knowledge of the same cooperates to further the fraudulent practices of another, he will be responsible therefor.

It is for you, members of the jury, to decide from all the [fol. 497] circumstances in this case and all the testimony you have heard, whether there was in this case such cooperation or knowledge on the part of the defendant on trial in connection with the actual representations made by others.

Instruction Number LI

There are two kinds of evidence. Direct or positive, and circumstantial. Direct and positive testimony is that which a person observes or sees or which is susceptible of demonstration by the senses, and circumstantial evidence is proof of such facts and circumstances concerning the conduct of a party which conclude or lead to a certain inevitable conclusion. Circumstantial evidence is legal and competent as a means of proving guilt in a criminal case, but the circumstances must be consistent with each other, consistent with the guilt of the party charged, inconsistent with his innocence and inconsistent with every other reasonable hypothesis except that of guilt, and when circumstantial evidence is of that character, it is alone sufficient to convict.

If the evidence can be reconciled either with the theory of innocence or guilt, the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted by the jury. You will review all of the circumstances in the light of this instruction.

But in this case you have no right to speculate, surmise, guess or gamble that the defendant is guilty or that there is a lik-lihood that he is more guilty than not guilty. If a situation arises with respect to any fact or facts in this case as to the existence or non-existence of a certain state of facts, then [fol. 498] it is your solemn duty as jurors to resolve the doubt in your mind as to any such fact in favor of the defendant.

Instruction Number LII

Intent is an ingredient of crime. The devising of an unlawful and fraudulent scheme or artifice is an act of the mind. It is psychologically impossible for you to enter into the mind of the defendant and determine the intent with which he operated. You must therefore determine the motive, purpose and intent from the evidence which has been presented and from all the facts and circumstances disclosed by the witnesses as testified to, bearing in mind that the law presumes that every man intends the natural and legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed cannot be justified on the ground of innocent intent. An intent may be presumed if unlawful acts have been committed as charged and it is shown that such acts were a part of the plan and intended to carry forward the scheme to defraud charged in the indictment.

If, however, you should find from the evidence in this case that misrepresentations were made and that anyone was in fact defrauded thereby, that would not establish the guilt of the defendant unless you further find that the defendant intended to defraud. In a mail fraud case, such as this, there is no presumption that each man intends the natural and legitimate consequences of his acts unless you definitely find from the evidence beyond a reasonable doubt that the defendant in this case intended definitely that persons investing their moneys in this stock should be defrauded.

Instruction Number LIII

[fol. 499] You will consider all exhibits and evidence admitted by the court before you and you will disregard all exhibits and evidence not admitted by the court and all exhibits and evidence stricken by the court. You will likewise disregard all argument and comment by counsel based on exhibits and evidence not admitted or stricken by the court, and you will consider exhibits and evidence limited in their evidentiary effect by the court only in accordance with the limitations and conditions stated by the court.

In this connection you are instructed you are not called upon to pass upon objections or exceptions made or taken by counsel and you should not allow the making of objections or exceptions by counsel to influence or confuse you.

In your deliberations and in reaching a verdict you should act only upon the evidence which is now before you and the law as given to you by the court.

Statements, if any, by counsel or the court, unsupported by your own recollection of the evidence, you will disregard.

While it would be proper for me as the trial judge to analyze the testimony and to give you my understanding of it, which, however, would not be binding upon you, my purpose is not to intimate to you any opinion I may have of any fact or the weight of any evidence, and if I refer or have referred to any facts in the case, it will not be and has not been for the purpose of indicating any opinion I may have of the facts, but simply to illustrate some proposition of law which is involved with the facts.

Instruction Number LIV

[fol. 500] I instruct you that if there are certain persons whose names have been mentioned in the evidence, who

might throw light upon the issues involved herein, and one party would naturally be presumed to have called such person and fails to call him, then you may infer that his testimony would be adverse to such party. On the other hand, where such person was equally accessible to both the prosecution and the defendant on trial and neither party called him, then you will infer nothing against either party for their failure to call him.

Instruction Number LV

You are the sole and exclusive judges of the evidence, and of the credibility of the several witnesses and of the weight to be attached to the testimony of each. In weighing the testimony of a witness, you have a right to consider his demeanor upon the witness stand, his apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the story such witness relates, and the interest, if any, you may believe a witness feels in the result of the trial, and any other fact or circumstance arising from the evidence which appeals to your judgment as in anywise affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of weight as in your judgment it is entitled to.

You will be slow to believe that any witness has testified falsely in the case, but if you do believe that any witness has wilfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely, except insofar as the same may be corroborated by other credible evidence in the case.

Instruction Number LVI

[fol. 501] You are instructed that the Government does not desire to have you conclude against the defendant unless the conclusion is supported by the evidence beyond a reasonable doubt, but that neither does it want a guilty man to escape.

You will appreciate that Congress has passed the law with the purpose of having it enforced; that it is a very important law, passed for the protection of the public against schemes to despoil and defraud and to prevent the Postal Service from being used as an agency in furthering such schemes; and that it is the duty of all public officials charged

with its enforcement, of whom you, as jurors, are a part, to proceed with such enforcement fearlessly and diligently without prejudice, or favoritism, or sympathy, or any other influence.

Instruction Number LVII

The indictment in this case will be sent to the jury room with you merely to show you the paper charge against the defendant, but is not to be considered as evidence. You will take with you to the jury room the exhibits in the case. The verdict is in the usual form. As to each count on which the defendant is being tried, before the word "guilty" is a blank, and you will write in there in each instance the word "is" or "not" as you find. It will require your entire number to agree upon a verdict and when you have so agreed you will cause your verdict to be signed by your foreman, whom you will elect from among your number immediately upon retiring to the jury room, and return with your verdict into court.

Counsel, have I overlooked anything? Any exceptions?

Mr. McDonald: Yes, Your Honor. I think the court instructed the other day—I would like an instruction again—[fol. 502] that the deposition of Compton I. White is to be considered just as though the testimony was given in Court.

The Court: The jury will so consider it and is so instructed.

Exceptions to Instructions

Mr. McDonald: As to the exceptions, Your Honor, in Your Honor's charge to the jury you made the statement that if the jury found that a scheme was formed, then if any letters were mailed, each letter became an offense. I think Your Honor should have qualified that by stating to the jury that it would be necessary that either the defendant knew, authorized or ratified the mailing of the letter.

The Court: The jury will understand that the instruction was given under that condition.

Mr. McDonald: Also I except to the references in the court's instructions to the words "clearing house association", there being no claim of any such thing in the indictment, regarding any clearing house association.

The Court: I think that word was contained in an instruction requested by the defendant.

Mr. McDonald: The point was that there was evidence of that; but in line with our objection of its not being included in the indictment, I except.

The Court: If there is any doubt about the intent of that particular thing, the jury will understand that the court in mentioning certain businesses or the names of certain businesses had in mind those that were mentioned in the indictment, and not any others not mentioned in the indictment.

Mr. McDonald: Then in the instruction which Your Honor gave with regard to the proclamation of the president on August 9, I except to the failure of the court to state in addition to what Your Honor did state that as a matter [fol. 503] of law the effect was to close private silver exchanges in the United States; and that was the evidence too, the court having instructed the jury to consider it, it being an undisputed fact in the case. I except to the court not giving the instruction requested, and of course the law had that effect.

The Court: Up to this time, each and every one of the exceptions allowed, except in respect to those instances where the court supplemented the instructions.

Mr. McDonald: Then I want to except to the instructions in which Your Honor commented about the money being solicited on a three per cent a month basis, dummy accounts, and I cannot remember all the instruction, but stating that as a one-sided and unfair comment on the evidence. I know Your Honor has a right to comment, but I think Your Honor should state the converse as well.

Also, Your Honor's instruction with regard to the effect of premises as to the future, opinions, in which Your Honor stated that the mere fact that the defendant may have stated something he did not know, in that Your Honor did not state that it must have been done by him with knowledge that it was false or with reckless disregard of its truth or falsity.

Also, I except to that part of the instruction in which the court alludes to the scheme as one which might include the defrauding of any one, my position being that it must be that class named in the indictment.

Also, I except to the failure of the court to give requested instruction number 79 to the effect that as long as one juror

entertains a reasonable doubt, then the jury cannot arrive at a verdict.

[fol. 504] DEFENDANT'S REQUESTED INSTRUCTIONS REFUSED

The following instructions were duly and timely requested by the defendant to be given by the Court to the jury. Each of said instructions were refused, to which the defendant took separate exception, which exceptions were duly allowed by the Court.

Instruction No. 4

I instruct you that that class of transactions called matched orders differs materially from wash sales in that they are actual and enforcible contracts, and where there is no publication of the volume or amount of such transactions they do not constitute fraudulent representations and serve no illegal purpose. Such orders are that class of transaction whereby some person sends a number of orders simultaneously to different brokers, some to buy and some to sell, and these brokers without knowing that other brokers have countervailing orders from the same principal execute them and the transactions become binding contracts between the brokers.

Instruction No. 46

You are instructed that the volume of transactions on an exchange, or the percentage of transactions on an exchange in a particular futures contract does not and cannot of itself spell a rigged market. Whenever the public has the right to place bids and offers in competition with others, whomsoever the others may be, then, in such case, there is not and cannot be a rigged or manipulated market. You are likewise instructed that where the market is free and open, and by free is meant opportunity is given to the public to have executed their orders through broker members of the particular exchange in competition with the orders of others, and by open is meant that the transactions on the exchange are conducted openly so that all broker [fol. 505] members may be advised of the bids and offers and given the opportunity to place other bids and offers in competition,—that cannot in such case be a regulated or

manipulated market. You are instructed that the defendant had the right at all times to offer silver futures for sale at the market or any price at which he saw fit in a market such as I have heretofore described to you. You are instructed that it would only be natural for the distributor of silver futures by means of transactions on an exchange to handle a large volume of business by reason of the fact that he was such distributor, and no inference of wrongdoing or fraud may be indulged in by you against the defendant by reason merely of the volume of his transactions.

Instruction No. 71

I instruct you, members of the jury, that a "wash sale" is defined as a transaction in which there is no passing of the beneficial title. It is a representation of a transaction passing title to property in the present from an anonymous or fictitious seller to a buyer. I instruct you that there is no evidence in this case of a present sale on the futures market of the Seattle Metal Exchange, and therefore the term "wash sale" does not apply to the transactions presented to you in the evidence here.

Instruction No. 79

Each juror must join in the conclusion that the accused is guilty of the offense as charged beyond a reasonable doubt; as long as one juror does entertain such a doubt [fol. 506] you cannot convict, and all you can do is to report an agreement impossible.

Allen v. U. S., 164 U. S. 492; 17 S. Ct. 154; 41 L. Ed. 528.
Burton v. U. S., 196 U. S. 183; 25 S. Ct. 243; 49 L. Ed. 482.
Nigro v. U. S. (C. C. A.), 4 Fed. (2d) 781.
Stewart v. U. S. (C. C. A.), 300 Fed. 769.

Whereupon the jury retired to deliberate upon their verdict.

VERDICT

Thereafter the jury returned into Court with a verdict of Guilty on each of the Counts—1, 2, 3, 4, 5, 6 and 8 of the Indictment.

[fol. 507] MOTION FOR NEW TRIAL

Comes now the defendant Pierce Lonergan, and moves the court to set aside the verdict of the jury herein, returned on the 15th day of May, 1936, and grant a new trial, for the reasons and upon the following grounds:

I

That said verdict as to each and every count upon which defendant was found guilty was against and contrary to law.

II

That said verdict as to each of said counts was against and contrary to the evidence.

III

Insufficiency of the evidence to justify the verdict as to said counts.

IV

That matters occurred in said trial prejudicial to the defendant and prevented him having a fair and impartial trial by the jury in this: The court erred in refusing to declare a mistrial on account of improper elicitation by the Assistant United States Attorney of the fact that one of the investor witnesses has lost his life insurance policy, which taken together with the hysterical outbursts of two women investors, was so prejudicial that it could not be cured by the statement of the Court to disregard it; to which refusal of the Court to declare a mistrial the defendant excepted at the time.

V

[fol. 508] The court erred in admitting in evidence, over the objection of the defendant, plaintiff's Exhibit No. 75, upon the ground that the same did not tend to prove any issue in the case and tended to prove the defendant guilty of crimes with which he was not charged, and was prejudicial to the defendant before the jury.

VI

The court erred in overruling defendant's motion for a directed verdict on all counts at the close of the Govern-

ment's case, upon the ground that the Government had failed to prove sufficient facts to make a case as to the commission of the crimes charged in said counts.

VII

The court erred in overruling defendant's motion for a directed verdict on all the counts of the indictment at the conclusion of the entire case, upon the ground that there was no competent proof before the jury as to the commission of the offenses charged in said indictment.

VIII

The court erred in admitting the evidence of witnesses R. J. Romer and May McGrew, as to representations made by salesman McKnight in the absence of the defendant and there being no evidence that the same were authorized or ratified by him.

IX

The court should grant the defendant a new trial for each and every instruction wherein defendant made objection thereto, and which were by the court overruled, and which exceptions were at the time made in the presence of the jury.

X

The court should grant the defendant a new trial for the [fol. 509] refusal of the court to give each and every instruction asked by defendant which was refused by the court, and for the modification of each instruction asked when instructions asked were modified by the court, and to the refusal to the giving of each of said instructions or to the modification of each of said instructions defendant at the time objected and made his exception in the presence of the jury.

Dated at Seattle, Washington, May 19th, 1936.

Pierce Lonergan, Defendant. Carkeek, McDonald & Harris, Carl B. Luckerath, Eugene Tong, His Attorneys.

The foregoing motion was filed on May 19, 1936, and submitted to the Court on May 28, 1936, on which day the motion was denied, exceptions taken and allowed.

(The above foot-note of three lines does not appear in the Original Bill of Exceptions certified to by the Clerk of the U. S. District Court for the Western District of Wash.)

[fol. 510] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO SERVE AND FILE BILL OF EXCEPTIONS AND ASSIGNMENT OF ERRORS—Filed June 22, 1936

This matter coming on to be heard upon order of the Court, in pursuance of the Rules of Practice and Procedure in criminal cases adopted by the Supreme Court of the United States on May 7, 1934, and the defendant appearing in person and by his counsel, and the plaintiff appearing by the United States, and the Court being fully advised in the premises.

It is Hereby Ordered that the time of the defendant for serving and filing his proposed Bill of Exceptions and assignment of errors herein be, and the same is, extended to and including the 15th day of August, 1936.

Done in open court this 22nd day of June, 1936.

John C. Bowen, District Judge.

We hereby consent to the entry of the above order.
J. Charles Dennis, United States Attorney. Owen P. Hughes, Assistant United States Attorney.

Presented by Donald A. McDonald.

[File endorsement omitted.]

[fol. 511] IN UNITED STATES DISTRICT COURT

ORDER INCORPORATING EXHIBITS IN BILL OF EXCEPTIONS AND WITHHOLDING THEIR TRANSMITTAL

This matter coming on for hearing on the stipulation of counsel for the Appellant and Appellee herein, and the Court being advised in the premises, it is hereby,

Ordered, Adjudged and Decreed that the Exhibits which have been received in evidence in the above entitled matter may be and the same are hereby incorporated, and by reference made a part of the proposed Bill of Exceptions, and

that the same shall be sufficiently identified by setting forth in said proposed Bill of Exceptions the number and a brief description of the Exhibits, which said Exhibits more particularly are described as Plaintiff's Exhibits: Nos. 1 to 11 inclusive; Nos. 13 to 17 inclusive; 19 to 45 inclusive, including 22-A, 22-B, 23-A, 23-B, 24-A, 24-B, 25-B, 26-A, 26-B; Nos. 47 to 57 inclusive; Nos. 59 to 74 inclusive; 75; 76-A, 76-B; 77 to 82 inclusive; and numbers 84-A, 84-B, 84-C, 84-D, 84-E; and Nos. 85 to 91 inclusive. All the foregoing numbered Exhibits being Plaintiff's Exhibits. And in addition thereto, Defendant's Exhibits: Nos. A-1 to A-9 inclusive; A-11; A-13 to A-19 inclusive; A-21 to A-39 inclusive, including A-28, A-28-1, A-28-2, A-28-3; A-20-A to A-40-J inclusive; A-43 to A-47 inclusive, including A-46-1, A-46-2, A-46-3 and A-46-4.

It is Further Ordered, Adjudged and Decreed that the Exhibits received in evidence in the above entitled cause, and more particularly described hereinabove, shall be forwarded to the Circuit Court of Appeals of the Ninth Circuit, at San Francisco, California, as part of the Appellant's transcript of the record in the above entitled matter. [fol. 512] That this order sending up said Exhibits incorporated in Bill of Proposed Bill of Exceptions, and in the original only is entered into by stipulation of counsel on both sides, and is approved by the Court in view of the voluminous character of the Exhibits, the impossibility of reproducing them satisfactorily within the limits of Bill of Exceptions, their intrinsic character as broker's books, records and advertising material, and for other reasons deemed sufficient by this Court rendering their inclusion in said Bill a matter of such great inconvenience as being incapable of being forwarded in any other manner.

It is Further Ordered, Adjudged and Decreed that the said Exhibits, more particularly described herein above, for the convenience of the parties may remain in custody of the Clerk of this Court at Seattle until Tuesday, the 15th day of December, 1936, before being forwarded to the Circuit Court of Appeals, when said Exhibits shall be forwarded to the said Clerk of said Circuit Court of Appeals unless further order or stipulation be entered in the above entitled cause, subject to the further order on this matter by this Court.

Done in open Court this 4th day of August, 1936.

John C. Bowen, Judge.

O. K. J. Charles Dennis, United States Attorney. Owen Hughes, Ass't. United States Attorney.

Presented by Carkeek, McDonald & Harris, Carl B. Luckerath, Attorneys for Appellant.

[fol. 513] Exhibits which have been received in evidence in the above entitled matter, and which are incorporated and by reference made a part of the Bill of Exceptions, by order of the Court, are as follows:

(1) Plaintiff's Exhibit No. 1—Manual of the Seattle Metal Exchange.
(2) Plaintiff's Exhibit No. 2—Pamphlet entitled, "Silver".
(3) Plaintiff's Exhibit No. 3—File entitled, "Market Letters".
(4) Plaintiff's Exhibit No. 4—Letter.
(5) Plaintiff's Exhibit No. 5—Newspaper clippings.
(6) Plaintiff's Exhibit No. 6—List.
(7) Plaintiff's Exhibit No. 7—Letter and receipts.
(8) Plaintiff's Exhibit No. 8—Document.
(9) Plaintiff's Exhibit No. 9—Resolution.
(10) Plaintiff's Exhibit No. 10—Telegram.
(11) Plaintiff's Exhibit No. 11—Letter.
(12) Plaintiff's Exhibit No. 13—Receipts.
[fol. 514] (13) Plaintiff's Exhibit No. 14—Letter.
(14) Plaintiff's Exhibit No. 15—Receipt.
(15) Plaintiff's Exhibit No. 16—Receipt.
(16) Plaintiff's Exhibit No. 17—Receipt.
(17) Plaintiff's Exhibit No. 19—Document.
(18) Plaintiff's Exhibit No. 20—Market letters.
(19) Plaintiff's Exhibit No. 21—Papers.
(20) Plaintiff's Exhibit No. 22, a, b—Books.
(21) Plaintiff's Exhibit No. 23, a, b—Books.
(22) Plaintiff's Exhibit No. 24, a, b—Books.
(23) Plaintiff's Exhibit No. 25 B—Book.
(24) Plaintiff's Exhibit No. 26, a, b—Books.
(25) Plaintiff's Exhibit No. 27—Documents.
(26) Plaintiff's Exhibit No. 28—Papers.
[fol. 515] (27) Plaintiff's Exhibit No. 29—Letter.
(28) Plaintiff's Exhibit No. 30—Letters.
(29) Plaintiff's Exhibit No. 31—Letter.

(30) Plaintiff's Exhibit No. 32—Letter.
(31) Plaintiff's Exhibit No. 33—Telegram.
(32) Plaintiff's Exhibit No. 34—Letters.
(33) Plaintiff's Exhibit No. 35—Papers.
(34) Plaintiff's Exhibit No. 36—Box.
(35) Plaintiff's Exhibit No. 37—Papers.
(36) Plaintiff's Exhibit No. 38—Papers.
(37) Plaintiff's Exhibit No. 39—Papers.
(38) Plaintiff's Exhibit No. 40—Cards.
(39) Plaintiff's Exhibit No. 41—Letter.
(40) Plaintiff's Exhibit No. 42—Checks.
[fol. 516] (41) Plaintiff's Exhibit No. 43—Checks.
(42) Plaintiff's Exhibit No. 44—Checks.
(43) Plaintiff's Exhibit No. 45—Receipts.
(44) Plaintiff's Exhibit No. 47—Papers.
(45) Plaintiff's Exhibit No. 48—Papers.
(46) Plaintiff's Exhibit No. 49—Documents.
(47) Plaintiff's Exhibit No. 50—Papers.
(48) Plaintiff's Exhibit No. 51—Receipts.
(49) Plaintiff's Exhibit No. 52—Letters.
(50) Plaintiff's Exhibit No. 53—Note.
(51) Plaintiff's Exhibit No. 54—Receipts.
(52) Plaintiff's Exhibit No. 55—Letters and Receipts.
(53) Plaintiff's Exhibit No. 56—Receipt.
(54) Plaintiff's Exhibit No. 57—Letter.
[fol. 517] (55) Plaintiff's Exhibit No. 59—Receipts.
(56) Plaintiff's Exhibit No. 60—Paper.
(57) Plaintiff's Exhibit No. 61—Receipts.
(58) Plaintiff's Exhibit No. 62—Papers.
(59) Plaintiff's Exhibit No. 63—Papers.
(60) Plaintiff's Exhibit No. 64—Letter.
(61) Plaintiff's Exhibit No. 65—Papers.
(62) Plaintiff's Exhibit No. 66—Papers.
(63) Plaintiff's Exhibit No. 67—Receipts.
(64) Plaintiff's Exhibit No. 68—Telegram and letter.
(65) Plaintiff's Exhibit No. 69—Telegram.
(66) Plaintiff's Exhibit No. 70—Document.
(67) Plaintiff's Exhibit No. 71—Letter.
(68) Plaintiff's Exhibit No. 72—Receipts.
[fol. 518] (69) Plaintiff's Exhibit No. 73—Letter.
(70) Plaintiff's Exhibit No. 74—Telegram.
(71) Plaintiff's Exhibit No. 75—Papers.
(72) Plaintiff's Exhibit No. 76-a, b—Letters.

(73) Plaintiff's Exhibit No. 77—Letter.
(74) Plaintiff's Exhibit No. 78—Receipts.
(75) Plaintiff's Exhibit No. 79—Receipts.
(76) Plaintiff's Exhibit No. 80—Letter.
(77) Plaintiff's Exhibit No. 81—Papers.
(78) Plaintiff's Exhibit No. 82—Bank's letter of credit.
(79) Plaintiff's Exhibit No. 84-a, -b, -c, -d, -e—Receipts.
(80) Plaintiff's Exhibit No. 85—Letters.
(81) Plaintiff's Exhibit No. 86—Stipulation and Daily Market Report.
(82) Plaintiff's Exhibit No. 87—Agreement.
[fol. 519] (83) Plaintiff's Exhibit No. 88—Agreement.
(84) Plaintiff's Exhibit No. 89—Papers.
(85) Plaintiff's Exhibit No. 90—Checks.
(86) Plaintiff's Exhibit No. 91—Checks.
(87) Defendant's Exhibit No. A-1—Booklet, "Silver Market".
(88) Defendant's Exhibit No. A-2—Cards.
(89) Defendant's Exhibit No. A-3—Papers.
(90) Defendant's Exhibit No. A-4—Papers.
(91) Defendant's Exhibit No. A-5—Contract.
(92) Defendant's Exhibit No. A-6, -7—Papers.
(93) Defendant's Exhibit No. A-8—Card.
(94) Defendant's Exhibit No. A-9—Cards.
(95) Defendant's Exhibit No. A-11—Book.
[fol. 520] (96) Defendant's Exhibit No. A-13, -14—Letters.
(97) Defendant's Exhibit No. A-15—Letters.
(98) Defendant's Exhibit No. A-16—Letter.
(99) Defendant's Exhibit No. A-17—Letter.
(100) Defendant's Exhibit No. A-18—Letters.
(101) Defendant's Exhibit No. A-19—Letter.
(102) Defendant's Exhibit No. A-21—Letters.
(103) Defendant's Exhibit No. A-22—Minutes.
(104) Defendant's Exhibit No. A-23—Minutes.
(105) Defendant's Exhibit No. A-24, -25—Publication "Northwest Investor".
(106) Defendant's Exhibit No. A-26—Book, "Risk and Risk-Bearing".
(107) Defendant's Exhibit No. A-27—Records.
(108) Defendant's Exhibit No. A-28, -1, -2, -3—Drawings.
(109) Defendant's Exhibit No. A-29—Card.

[fol. 521] (110) Defendant's Exhibit No. A-30, -31, -32, -33—Charts.

(111) Defendant's Exhibit No. A-34—Articles.

(112) Defendant's Exhibit No. A-35—Pamphlet.

(113) Defendant's Exhibit No. A-36—Pamphlet.

(114) Defendant's Exhibit No. A-37—Charts.

(115) Defendant's Exhibit No. A-38—Letter.

(116) Defendant's Exhibit No. A-39—Rules & Regulations of Seattle Metal Exchange.

(117) Defendant's Exhibit No. A-40-a—Card.

(118) Defendant's Exhibit No. A-40-j—Statement of Account.

(119) Defendant's Exhibit No. A-43—Chart.

(120) Defendant's Exhibit No. A-44—Correspondence.

(121) Defendant's Exhibit No. A-45—Pamphlet.

(122) Defendant's Exhibit No. A-46, -1, -2, -3, -4—Sketches.

(123) Defendant's Exhibit No. A-47—Assay Office Returns.

[fol. 522] PLAINTIFF'S EXHIBIT No. 7

Louis Martin Company,

Bullion Brokers,

American Bank Building,

Seattle, Washington

Eliot 3055.

Cable Address "Lomar", Seattle.

December 16, 1933.

Mr. Frank Givens, Port Orchard, Washington.

DEAR MR. GIVENS:

We wish to thank you for the account that you have opened with us today, and for your orders for the purchase of silver. Enclosed you will find our receipt for the sum of money deposited by you, together with the confirmations of the purchases of silver futures that we have obtained for you on the Seattle Metal Exchange.

On the first of each month, we will mail you a detailed statement of your account, and every week you will receive

our market letter which will keep you advised as to the price fluctuation and activities in the world which affects the silver market.

Please feel free to call on us at any time for information or advice. We have a large amount of statistical data and other services which are entirely at your disposal.

We appreciate the confidence that you have placed in us and assure you that we will be at your service at all times.

We remain,

Yours truly, Louis Martin Company. W. G. Coventry.

[fol. 523] PLAINTIFF'S EXHIBIT No. 73

Seattle, Washington, November 13, 1933.

L. C. McCaslin, Port Orchard, Wash.

DEAR MAC:

I just discovered today that we had failed to send you a check with our statement. I am enclosing cashier's check for $688.35, as the balance due you on your account.

Silver is going up right along, but it has a long way to go yet before it reaches the top. You had better get in and get some more before you lose out altogether.

Yours very truly, Jack. J. R. Walsh.

Encl—1.
MR/W.

[fol. 524] PLAINTIFF'S EXHIBIT No. 52

Silver Markets: "Seattle, Shanghai, Bombay, London, New York, Seattle"

Seattle Silver Market

Market Letter

Seattle, Washington

July 13, 1934.

Announcement

The expanding activities of the Seattle Metal Exchange necessitated additional accommodations. Friends and cus-

tomers may obtain visitors cards for the purpose of inspecting these modern quarters where may be seen facilities connecting the Exchange with the important Silver Markets of this country and the Orient. Under special arrangement with Western Union and the Radio Corporation of America, communication is had with Shanghai, China, in eight minutes. This service takes precedence over all commercial service in America. More than three hundred brokerage firms in Shanghai and vicinity obtain quotation service from Seattle and Seattle brokers have available service from Shanghai with the same rapidity. Silver brokers and customer banks in San Francisco have a regular quotation service from Seattle. It is with a sense of pride and satisfaction in accomplishment that the member brokers of the Seattle Metal Exchange and their associates realize that Seattle has been put upon the Silver map of the World.

Your broker will be pleased to supply you and your friends with visiting cards which will admit you to the floor of the Seattle Metal Exchange.

[fol. 525] Silver

Perhaps the most important Reconstructive Legislation in modern times—with inconceivable National and International effects—was effected on Tuesday, June 19th, when the President of the United States signed the Silver Purchase Act of 1934.

When the recognized leader of the greatest creditor nation in the world affixes his signature to legislation authorizing and Directing the Secretary of the Treasury to buy; at home and abroad, silver bullion to an estimated amount of one billion, three hundred million ounces at a limit price of $1.29 per ounce—there is justification for characterizing this legislation as the most important in world affairs since the signing of the Armistice.

A careful analysis of the Silver Purchase Act of 1934, which is the result of nation-wide discussion and controversy for more than a decade, discloses a vitally important and far-reaching policy on the part of the American Government, which cannot possibly fail to react upon all other nations.

The Secretary of the Treasury is authorized and directed to purchase at home and abroad, Silver bullion sufficient to

provide a backing of 25% of United States currency at world market prices. Such purchases are to be paid for by the issue of Silver Certificates or Standard Silver Dollars based on a fixed monetary value of $1.29 per ounce, and such Silver Certificates are specifically recognized as legal tender for all purposes.

The estimated quantity of Silver bullion necessary to build up a 25% coverage of American currency is one billion, three hundred million ounces or equivalent to approximately nine years world production at the present time.

The entry into the world's markets of a cash customer of many times greater purchasing power than has ever entered the world's Silver Bullion markets before, discloses only a part of the probable effect of revolutionary legislation.

While this cash customer with unlimited credit is authorized and directed to buy one billion, three hundred million ounces of Silver Bullion, there are thousands of other cash customers whose necessities must be taken care of and the aggregate necessities of all other purchasers will probably amount to one-third the requirements of their huge competitor.

[fol. 526] American Governmental purchases under the Act, amounting to one billion, three hundred million ounces, therefore presage a total world demand of well up to two billion ounces of Silver at a limit of $1.29 per ounce—or approximately twelve years total world production at present levels.

The Secretary of the Treasury is directed not to re-sell any such purchases at less than $1.29 per ounce, which automatically eliminates any possibility of future dumping of Silver on domestic or world markets.

It is almost inconceivable that any of the other important nations will fail to follow suit in the adoption of such a national policy with regard to Silver now that recognized leadership has been provided by the most important creditor nation in the world. They will be committing financial suicide to sell their important Silver—say, twenty million ounces per annum (i.e. Canada)—for $9,000,000 (at present market) and have that identical Silver trade marked by her competitive neighbor (that is, minted) into legal tender amounting to twenty five million, eight hundred thousand dollars. Of course, the entirely logical conclusion is that

these countries may be expected to follow American leadership in the very near future.

The results, national and international, of this great leadership in stabilization of Silver prices at much higher levels, can scarcely be conceived and certainly have not yet begun to be felt, but will certainly follow in the not distant future.

The holders of Silver may be expected to feel recovery first and to the maximum.

Silver Purchase Act of 1934

The features of the new legislation on Silver insofar as they affect investors in Silver are limited to a tax of fifty per cent upon the net profits.

Other features of the act and the regulation thereunder applies in particular to directions and instructions to the Treasury Department as to the procedure in the issuance of currency, collection of taxes, et cetera. A major portion of the act is taken up with the definitions of terms for the purpose of guiding Government operations.

Because the Government program has assured a constant up-trend without substantial set-backs in the market, dealers in Silver and brokers realize that there is less risk in [fol. 527] handling accounts and in most instances have reduced their guarantee or marginal requirements. Several of the principal firms have reduced the customary twelve cent per ounce margin to six cents per ounce. This makes it possible to offset the fifty per cent Government tax by cutting in half the initial investment. The relative net profit is the same although half of the profit is paid to the Government as a profit tax. That is to say, the purchase of ten thousand ounces of Silver now requires an initial investment of $600 instead of $1200. An advance in the price of Silver from 50 cents at the present approximate level to $1.29 means an advance of 79 cents per ounce or an advance in price of $7900 on ten thousand ounces of Silver, or 1300% on the initial investment of $600 for those who maintain their position. The Government tax of 50% still leaves better than 600% profit on the above basis.

For several years past we have told our friends and prospective investors that there was a splendid opportunity to make money in Silver. We know now that our predictions are being substantiated. Conditions which our experts had

analyzed and facts at their disposal justified our prediction that the Governments of the World would be bound "to do something for Silver." We knew that politicians would climb aboard the Band Wagon to forward a movement that was already assured. We have said before and we say again, Money can be made in Silver.

Louis Martin Co., Member Seattle Metal Exch., 211 American Bank Bldg., Eliot 3055.

Any information tendered or any opinion expressed herein is drawn from sources considered reliable, but no responsibility is assumed by us for the accuracy thereof.

[fol. 528] PLAINTIFF'S EXHIBIT No. 11

Louis Martin Company,

Bullion Brokers,

American Bank Building,

Seattle, Washington

Eliot 3055.

Cable Address "Lomar", Seattle.

July 30, 1934.

Mrs. Lillian J. Lyman, Assembly Hotel, Seattle, Washington.

DEAR MADAM:

Your failure to make satisfactory deposits on your contracts for the purchase of five December Silver will make it necessary for us to liquidate your account.

This is to notify you that unless satisfactory arrangements are made prior thereto, we will sell out your account at 9:30, Tuesday morning, July 31, 1934, or as soon thereafter as we can do so, at the market.

We will be compelled to hold you responsible for any deficit.

Yours truly, Louis Martin Company. J. R. Walsh.

JRW:g.

[fol. 529] PLAINTIFF'S EXHIBIT No. 29

Louis Martin Company,
Bullion Brokers,
American Bank Building,
Seattle, Washington

Eliot 3055.

Cable Address "Lomar", Seattle.

July 30, 1934.

Norman Edward Co., 612 Insurance Bldg., Seattle, Wash.

GENTLEMEN:

Your failure to make satisfactory deposits on your contracts for the purchase of three hundred seventy-two September and three hundred seventy-five December silver will make it necessary for us to liquidate your account.

This is to notify you that unless satisfactory arrangements are made prior thereto, we will sell out your account at 9:30, Tuesday morning, July 31, 1934, or as soon thereafter as we can do so, at the market.

We will be compelled to hold you responsible for any deficit.

Yours truly, Louis Martin Co. J. R. Walsh.

JRW:MIH.

[fol. 530] PLAINTIFF'S EXHIBIT No. 32

Norman Edward Company,
Bullion Brokers,
Insurance Building,
Seattle, Washington

Main 7626.

Cable Address "Nored", Seattle.

July 28, 1934.

Frank Anderson, 2021½ Yale North, Seattle, Washington.

DEAR SIR:

The security is impaired upon your contract for the purchase of one September Silver. Due to market conditions,

we are compelled to require additional margins in an amount sufficient to protect your account.

Unless these guarantees are given on or before 3:00 P. M., Monday, July 30, 1934, we will sell out your account at the market at 9:30 A. M., Tuesday, July 31, 1934, or as soon thereafter as is possible.

We shall be compelled to hold you liable for any deficit on your account.

Yours truly, Norman Edward Company, by Norman E. Coles, Manager.

NEC:g.

[fol. 531] PLAINTIFF'S EXHIBIT No. 30

Norman Edward Company,
Bullion Brokers,
Insurance Building,
Seattle, Washington

Main 7626.

Cable Address "Nored", Seattle.

August 23, 1934.

Mr. J. I. Romer, 510 Second Avenue, Seattle, Washington.

DEAR MR. ROMER:

This is to advise you that the condition of your account for the purchase of twenty-four September Silver is such as to be greatly impaired, and we are hereby demanding additional security.

You are hereby notified to deposit with us the sum of Three Thousand Seven Hundred Twelve Dollars and Forty-one cents ($3,712.41), on or before 10:30 A. M., Monday, August 27, 1934.

In the event of your failure so to do, your account will be closed and your contracts sold at the market, subject to and under the provisions of the terms of your agreement with us.

Yours truly, Norman Edward Company, by Norman E. Coles.

NEC:MEL.
Enc.

I do hereby acknowledge receipt of the foregoing letter.

J. I. Romer.

[fol. 532] Copy

August 23, 1934.

Norman Edward Co., 612 Insurance Bldg., Seattle, Wash.

GENTLEMEN:

This is to advise you that the condition of your account for the purchase of eighteen December Silver and twenty-five September Silver is such as to be greatly impaired, and we are hereby demanding additional security.

You are hereby requested to deposit with us the sum of Twelve Thousand Seven Hundred Forty-six Dollars and Forty-eight cents ($12,746.48), on or before 10:30 A. M., Monday, August 27, 1934.

In the event of your failure so to do, your account will be closed and your contracts sold at the market, subject to and under the provisions of the terms of your agreement with us.

Yours truly, Louis Martin Co. (Signed) J. R. Walsh.

JRW:MLH.

[fol. 533] PLAINTIFF'S EXHIBIT No. 75

August 17, 1934.

Mr. Pierce Lonergan, 211 American Bank Building, Seattle, Washington.

DEAR SIR:

We are attorneys for Mr. A. M. Atwood who for approximately the last year and a half had been buying and selling silver on the Seattle Metal Exchange, through Louis Martin Company, silver brokers.

During the middle of July last, Mr. Atwood had on hand silver futures, as follows:

1,000 ounces September
2,000 " "
2,000 " March, 1935.

with a total credit margin of $324.93 in cash.

By reason of an alleged dumping of several hundred thousand ounces of silver on the Seattle market at ap-

proximately that time, the market was driven down each day to the maximum permitted under the law, with the result that on July 28th, Louis Martin Co. advised Mr. Atwood that an extra margin requirement was necessary to maintain his silver options, and that it must be put up not later than Monday, July 30th, and, failing to do so, would necessitate the selling of his silver options at the market.

After conferences with Mr. Pierce Lonergan and Mr. J. P. Walsh, Mr. Atwood deposited $400.00 in the Trust Department of the First National Bank, as an extra margin, conditioned upon the performance of your contract and by the delivery by you of 3,000 ounces of September option silver bullion .999 fine and 2,000 ounces of March option silver bullion .999 fine.

Mr. Atwood thus had covered the required margins. On Monday, August 6th, Mr. Atwood had a conference with Mr. Pierce Lonergan, wherein Mr. Lonergan informed Mr. Atwood that the Seattle Metal Exchange was broke; that Louis Martin Co. was broke and that there was an impending law suit involving about $150,000, which suit would tie up all the funds in Louis Martin Co., and the Seattle Metal Exchange, and that Mr. Atwood had better hurry and get his $400 deposit back before these litigants tied it up and attached it, Mr. Lonergan at that time informing Mr. Atwood that the attorneys for such litigants were in conference and that the suit would be started immediately. Accordingly, Mr. Atwood attempted to reach Mr. Walsh in order to secure a release of his deposit at the First Na- [fol. 534] tional Bank and was unable to do so on that day.

On August 9th, however, Mr. Atwood reached Mr. Walsh, who made arrangements for Mr. Atwood to take back his $400.00 deposit in the First National Bank. Mr. Atwood took Mr. Walsh's letter authorizing the withdrawal of the $400 deposit and obtained such deposit.

Within an hour after Mr. Atwood had withdrawn his deposit and sold his silver options at Mr. Lonergan's and Mr. Walsh's pleadings, the President proclaimed the nationalization of silver, at 50.01.

The allegations and persuasions made by Mr. Pierce Lonergan and Mr. J. P. Walsh to Mr. Atwood were obviously fraudulently made and were made solely with the intent to get Mr. Atwood out of the market in order to buy his silver at a low price in order that the same might

be sold upon the nationalization of silver, which latter event Mr. Pierce Lonergan had been expecting for some time.

Reference is here made to Rem. Rev. Stat. of the State of Washington, No. 2477, and as attorneys for Mr. A. M. Atwood, and pursuant to said statute, we herewith demand that the Seattle Metal Exchange and Louis Martin Co., or either, or both, furnish Mr. Atwood a written statement containing the names of the persons to whom his silver options were sold, the time when, the place where, the amount of, and the price at which the same was sold. You may comply with this demand by furnishing the same within 48 hours to the writer, at this office.

You are further advised that Mr. A. M. Atwood was defrauded by the misrepresentations of Mr. Pierce Lonergan and Mr. J. P. Walsh and that he will seek legal redress, if necessary, to recover his damages sustained by him by reason of such fraudulent misrepresentations.

Yours very truly, Battle, Hulbert, Helsell & Bettens,
by Joseph E. Gandy.

JEG:AC.

Plaintiff's Exhibit No. 75 (to which is attached 2 receipts for registered mail, receipted as follows: Louis Martin Co., by W. G. Coventry, dated Aug. 18, 1934, and Pierce Lonergan, by M. Rowland, dated Aug. 18, 1934).

[fol. 535] PLAINTIFF'S EXHIBIT No. 76-A

Louis Martin Company,
Bullion Brokers,
American Bank Building,
Eliot 3055. Seattle, Washington

Cable Address "Lomar", Seattle.

August 20, 1934.

Battle, Hulbert & Helsell, 10th Floor Exchange Building, Seattle, Washington.

Attention Mr. Joseph E. Gandy.

GENTLEMEN:

Following is the information requested by you regarding the transactions for the account of Mr. A. M. Atwood on August 9, 1934.

Option	Price	Amount	Sold to
6 Sept.	44¢	$1,320.00	Jordan Co.
4 March	44¢	880.00	Jordan Co.

These transactions took place at Seattle, Washington. Any further information you may wish, please advise us.

Yours truly, Louis Martin Co. J. R. Walsh—(M. L. H.)

JRW:MLH.

[fol. 536] PLAINTIFF'S EXHIBIT No. 76-B

Louis Martin Company,

Bullion Brokers,

American Bank Building,

Seattle, Washington

Eliot 3055.

Cable Address "Lomar", Seattle.

August 21, 1934.

Mr. A. M. Atwood, % John Davis Co., Seattle, Washington.

DEAR SIR:

Your communication of the 19th day of August, making certain statements through your attorneys regarding the manner in which your Silver contract account with Louis Martin Co. had been handled, has been received.

This is to advise you that upon your depositing with us the sum of Two Thousand Two Hundred and Thirty-eight dollars & seventy-five cents ($2,238.75), representing ninety percent (90%) of the contract price of the silver contracted by you your account will be reinstated for the amount of Silver and at the price contracted by you, provided, however, that you comply with the terms, conditions and provisions upon which you originally contracted the Silver and particularly the terms of your contract as evidenced by your signature card.

The deposit of $2,238.75 with us must be made by you on or before noon, Thursday, August 23, 1934.

Sincerely yours, Louis Martin Co., by J. R. Walsh—(M. L. H.)

[fol. 537] PLAINTIFF'S EXHIBIT No. 90

19-11-12.
No. 247.

The Bank of California,
National Association,
Seattle, Washington

Seattle, Washington, April 25, 1934.

Pay to the Order of Pierce Lonergan $400.00
The Sum * * * * * * 400 Dol's 00 Cts. . . . Dollars.

Gill & Co., by Helen Latimer.

Endorsement on back: Pierce Lonergan.

(The above is one of four checks all similar in form, but in different amounts, as follows:

Check No.	Date 1934	Payee	Amount	Endorsement
186	3/10	Pierce Lonergan	$577.17	Bank Stamp
250	4/26	Pierce Lonergan	300.00	Pierce Lonergan
106	1/2	Cash	1750.90	Pierce Lonergan

[fol. 538] PLAINTIFF'S EXHIBIT No. 91

19-28-12.
No. 787.

The Pacific National Bank of Seattle

Seattle, Washington, June 6, 1934.

Pay to the Order of —— $1100.00
The Sum * * * * * * 1100 Dol's 00 Cts. . . Dollars.

Louis Martin Co., By J. R. Walsh, Pres.

Endorsement on back: Pierce Lonergan.

(The above is one of 5 checks all similar in form, but in different amounts, as follows:

Check No.	Date 1934	Payee	Amount	Endorsement
683	5/2	Pierce Lonergan	$300.00	Pierce Lonergan
671	4/26	Pierce Lonergan	550.00	Pierce Lonergan
670	4/26	Pierce Lonergan	250.00	Pierce Lonergan
681	4/30	Pierce Lonergan	1000.00	Pierce Lonergan

[fol. 539]

PLAINTIFF'S EXHIBIT No. 19

Norman Edward Co.,
Silver Brokers,
Associate Broker Louis Martin Co.
Member Seattle Metal Exchange,
Insurance Building, Seattle, Wash.

Date June 6, 1934

We have Sold This Day For Your Account And Risk Through—Name of Broker Furnished On Request.

No.	Quantity	Description	Price	Amount	Interest	Com. Tax	Int. & Post.	Total
	7500 oz.	June Silver	.45-5/8					

For Account of Mrs. Mae Engel.

It is agreed between broker and customer:

1. That all transactions are subject to the rules and customs of the Seattle Metal Exchange and its clearing house, or Rules of Exchange where order is executed.
2. That all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him, either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to the customer.

Norman Edward Co., by M. E. L.

(being one of several Bought & Sold forms, all similar in form, one of which Sold forms in said Exhibit is above set forth.)

Plaintiff's Exhibit No. 19—Continued

[fol. 540]

Norman Edward Co.,
Silver Brokers,
Associate Broker Louis Martin Co.
Member Seattle Metal Exchange
Insurance Building, Seattle, Wash.

Date June 6, 1934.

We Have Bought This Day For Your Account And Risk Through—Name of Broker Furnished On Request.

No.	Quantity	Description	Price	Amount	Interest	Com. Tax	Int. & Post.	Total
	3500 oz.	Dec. Silver	.49-1/8					

For Account of Mrs. Mae Engel.

It is agreed between broker and customer:

1. That all transactions are subject to the rules and customs of the Seattle Metal Exchange and its Clearing House, or Rules of Exchange where order is executed.

2. That all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him, either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to the customer.

Norman Edward Co., By M. E. L.

(being one of several Bought & Sold forms, all similar in form, one of which Bought forms in said Exhibit is above set forth)

[fol. 541]

Louis Martin Co.,
Members Seattle Metal Exchange
211 American Bank Building
Seattle, Washington

Mar. 2, 1934.

We have Sold this day for your account and risk through—Name of broker furnished on request.

No.	Quantity	Description	Price	Amount	Interest	Commission	Total
	8000 oz.	Mar. Silver	48				

For Account of Mrs. Mae Engel,
201 Olympic Place, Seattle, Wash.

It is agreed between broker and customer:

1. That all transactions are subject to the rules and customs of the Seattle Metal Exchange and its Clearing House, or Rules of Exchange where order is executed.

2. That all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him, either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to the customer.

Louis Martin Co.

(being one of several Bought & Sold forms, all similar in form, one of which Sold forms in said Exhibit is above set forth)

Plaintiff's Exhibit No. 19—Continued

[fol. 542]

Louis Martin Co.,
Members Seattle Metal Exchange
211 American Bank Building
Seattle, Washington

September 23, 1933.

We have Bought this day for your account and risk through—Name of broker furnished on request.

No.	Quantity	Description	Price	Amount	Interest	Commission	Total
	5000 oz.	June Silver	.43-3/8				

For Account of Mrs. Mae Engel,
201 Olympic Place, Seattle, Wash.

It is agreed between broker and customer:

1. That all transactions are subject to the rules and customs of the Seattle Metal Exchange and its Clearing House, or Rules of Exchange where order is executed.

2. That all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him, either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to the customer.

Louis Martin Co.

(being one of several Bought & Sold forms, all similar in form, one of which Bought forms in said Exhibit is above set forth)

[fol. 543]

Louis Martin Co.,
Members Seattle Metal Exchange
211 American Bank Building
Seattle, Washington

May 2, 1934.

We have Sold this day for your account and risk through—Name of broker furnished on request.

No.	Quantity	Description	Price	Amount	Interest	Com. Tax	Ins. & Post.	Total
	2500 oz.	June Silver	.43-3/4					

For Account of Mrs. Mae Engel.

It is agreed between broker and customer:

1. That all transactions are subject to the rules and customs of the Seattle Metal Exchange and its Clearing House, or Rules of Exchange where order is executed.

2. That all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him, either separately or together with other securities, either for the sum due thereof or for a greater sum, all without further notice to the customer.

Louis Martin Co.

(being one of several Bought & Sold forms, all similar in form, one of which Sold forms in said Exhibit is above set forth)

Plaintiff's Exhibit No. 19—Continued

[fol. 544]

Louis Martin Co.,
Members Seattle Metal Exchange
211 American Bank Building
Seattle, Washington.

Mar. 2, 1934.

We have Bought this day for your account and risk through—Name of broker furnished on request.

No.	Quantity	Description	Price	Amount	Interest	Commission	Total
	3000 oz.	June Silver	50				

For Account of Mrs. Mae Engel.

It is agreed between broker and customer:

1. That all transactions are subject to the rules and customs of the Seattle Metal Exchange and its Clearing House, or Rules of Exchange where order is executed.

2. That all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him, either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to the customer.

Louis Martin Co.

(being one of several Bought & Sold forms, all similar in form, one of which Bought forms in said Exhibit is above set forth)

[fol. 545]

DEFENDANT'S EXHIBIT No. A-3

Louis Martin Co.

Order

Feb. 8, 1934.

Subject to the rules, regulations and customs of the Exchange on which this order is executed, and any rules, regulations and requirements of its Board of Directors, and all amendments that may be made thereto, also subject to delays and conditions over which we have no control, Buy for my (or our) account and risk.

1 June @ 49-6.

Order # 5

Signed by Norman Edward Co., N. E. Coles.

N. E. C. Ex 2/8/ PM.
Form 1.

(being one of several Order & Buy forms on Louis Martin Co. forms, issued and signed by various customers, one of which Order forms in said Exhibit is as above set forth)

[fol. 546]

Defendant's Exhibit A-3—Continued

Louis Martin Co.

Members Seattle Metal Exchange

211 American Bank Building

Seattle, Washington

Mar. 8, 1934.

We have Bought this day for your account and risk through—Name of broker furnished on request.

No.	Quantity	Description	Price	Amount	Interest	Commission	Total
5	500 oz.	June Silver	.49-3/4				

For Account of Norman Edward Co.,
612 Insurance Bldg., Seattle, Washington.

It is agreed between broker and customer:

1. That all transactions are subject to the rules and customs of the Seattle Metal Exchange and its Clearing House, or rules of Exchange where order is executed.

2. That all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him, either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to the customer.

Louis Martin Co.

(being one of several Order & Buy forms on Louis Martin Co. forms, issued to various customers, one of which Buy

[fol. 547] IN UNITED STATES DISTRICT COURT

[Title omitted]

CERTIFICATE TO BILL OF EXCEPTIONS

I, the undersigned United States District Judge of Washington, Northern Division, and the Judge before whom the above entitled action was tried, to-wit, the cause entitled United States of America vs. Pierce Lonergan, et al, defendants, do hereby certify that the foregoing Bill of Exceptions contains all the material facts, matters, things, proceedings, rulings and exceptions thereto occurring upon the trial of said cause, and not heretofore a part of the record herein, and the same are hereby made a part of the record herein, including all evidence adduced at the said trial; and I further certify that the Exhibits set forth, or referred to, or both, in the foregoing Bill of Exceptions constitute all of the Exhibits offered in evidence in the said trial, and I hereby make all said Exhibits a part of the foregoing Bill of Exceptions. The Bill further includes the exceptions of the defendant throughout the trial of said cause. The Specific Exhibits to be forwarded are set forth in the order of this Court, which order is made a part of this Bill of Exceptions, and as such is approved as the correct list [fol. 548] of Exhibits to be forwarded, and these Exhibits are made a part of the within Bill of Exceptions by this order and certification.

That in addition to the Exhibits to be forwarded in the original above set forth, This Bill of Exceptions contains reproductions of the following Exhibits: Plaintiff's Exhibits Numbers: 7, a letter; 73, a letter; 52, a market letter; 32, a letter; 29, a letter; 11, a letter; 30, letters; 75, a letter; 76-a,-b, letters; 90, checks; 91, checks; 19, confirmations; and, Defendant's Exhibit No. A-3, which are approved as correct and true copies of the originals, and shall be forwarded in addition to the originals thereof. That this order sending up certain Exhibits in the original only is entered into by stipulation of counsel on both sides, and is approved by the Court, in view of the voluminous character of the Exhibits, and the impossibility of reproducing them satisfactorily within the limits of a Bill of Exceptions, their intrinsic character as broker's books, records, and advertising material, and for other reasons deemed sufficient by this

Court, rendering their inclusion in said Bill a matter of such great inconvenience as being incapable of being forwarded in any other manner.

The Bill in addition contains all the instructions of the Court, and the restatement of rulings of the Court as to certain Exhibits in evidence, and the rulings on the admissions thereof given the jury by the Court at the conclusion of the case, together with exceptions taken by the defendant to certain instructions given, and to instructions proposed by the defendant, and refused.

That amendments that have been proposed have been con- [fol. 549] sidered and are incorporated in said Bill or rejected as immaterial. That due and regular application to the Court for settlement and certifying of said Bill of Exceptions was made and served upon the plaintiff within the term and extension of term, as made by order of this Court, which said order is hereby made a part of this record, which said notice of settlement and certifying of Bill of Exceptions certified the time and place to settle and certify said Bill of Exceptions.

I hereby settle and allow the foregoing Bill of Exceptions as a full, true and correct Bill of Exceptions in this cause, and order the same filed as part of the record herein, and further order the Clerk of this Court to attach to the said Bill of Exceptions all of said Exhibits not set forth herein, and to transmit said entire Bill of Exceptions, including all Exhibits whatsoever, to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that the foregoing Bill of Exceptions contain all local rules relating to the extension of the term for the purpose of presenting, settling and filing a Bill of Exceptions, and all orders made by me extending the time for such presentation, settling and filing, and that the foregoing Bill of Exceptions is presented, settled and allowed within the time prescribed for that purpose.

Dated this — day of August, 1936.

John C. Bowen, United States District Judge.

[fol. 550] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed August 14, 1936

Comes Now the defendant, Pierce Lonergan, in the above entitled cause, and in connection with and in support of his appeal, herein, submits the following Assignments of Error, as the basis for reversal of judgment and sentence imposed upon him as manifest error in the records, proceedings and judgment and sentence, as follows, to-wit:

I

The Court erred in overruling the demurrer filed herein on behalf of the defendant, to each and every count of the indictment, to which ruling the defendant excepted and his exception was allowed.

II

The Court erred in denying defendant's motion to dismiss each and every count of the indictment at the close of the Government's opening statement to the jury, to which ruling defendant excepted, and his exception was allowed.

III

The Court erred in denying the challenge of the defendant to the sufficiency of the Government's evidence on each and every count of the indictment, and in denying his motion for an order to direct the jury in said cause to return [fol. 551] a verdict of not guilty on each and every count of the indictment, made at the close of the Government's case, to which ruling the defendant excepted, and his exception was allowed.

IV

The Court erred in denying defendant's motion for an order requiring the Government to elect upon which one of the two schemes, charged in the indictment, defendant Lonergan was to be tried, which motion was made at the close of the Government's case, and to which ruling the defendant excepted, and his exception was allowed.

V

The Court erred in denying defendant's motion to strike the Exhibits made the basis of counts 1, 2, 3, 4, 5, 6 and 8, made at the conclusion of all the testimony and evidence at the trial, to which ruling defendant excepted, and his exception was allowed.

VI

The Court erred in denying defendant's challenge to the sufficiency of the evidence for directed verdict of not guilty on each and every one of the counts 1, 2, 3, 4, 5, 6 and 8 of the indictment, and that the case be dismissed, when said motion was renewed at the conclusion of all the testimony and evidence at the trial, to which ruling defendant excepted, and his exception was allowed.

VII

The Court erred in denying defendant's motion for a new trial, upon each and every one of the counts 1, 2, 3, 4, 5, 6 and 8 of the indictment, to which ruling the defendant excepted, and his exception was allowed.

[fol. 552]

VIII

The Court erred in pronouncing judgment and sentence upon the defendant.

IX

The Court erred in admitting in evidence, and in denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 7, being the basis of Count I of the Indictment as follows:

Louis Martin Company,
Bullion Brokers,
American Bank Building,
Seattle, Washington

Eliot 3055.

Cable Address "Lomar", Seattle.

December 16, 1933.

Mr. Frank Givens, Port Orchard, Washington.

DEAR MR. GIVENS:

We wish to thank you for the account that you have opened with us today, and for your orders for the purchase of silver. Enclosed you will find our receipt for the sum of money deposited by you, together with the confirmations of the purchases of silver futures that we have obtained for you on the Seattle Metal Exchange.

On the first of each month, we will mail you a detailed statement of your account, and every week you will receive our market letter which will keep you advised as to the price fluctuation and activities in the world which affects the silver market.

Please feel free to call on us at any time for information or advice. We have a large amount of statistical data and other services which are entirely at your disposal.

We appreciate the confidence that you have placed in us and assure you that we will be at your service at all times.

We remain,

Yours truly, Louis Martin Company. W. G. Coventry.

[fol. 553] The testimony in support of its admission, given by witness Frank Givens, Port Orchard, Washington, is as follows:

It is an acknowledgement that I had sent in an order and the money for silver futures. I received this letter through the mails from Louis Martin Company, addressed to Frank Givens, Port Orchard, Washington.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. No sufficient foundation was laid for its introduction in evidence. It was a third party record.

2. No showing was made that defendant placed, or caused said Exhibits to be placed in the United States mails.

3. No evidence was admitted to establish or bind defendant with liability for the use of the United States mails in the mailing of such Exhibit.

4. The use of the United States mails in the sending thereof was not shown to have been wrongful, fraudulent, or in the execution of a scheme to defraud, as charged in the indictment.

5. That said Exhibit constitutes hearsay evidence against and prejudicial to the defendant.

X

The Court erred in admitting into evidence, and in denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 73, being the basis of Count II of the Indictment, as follows:

Seattle, Washington, November 13, 1933.

L. C. McCaslin, Port Orchard, Wash.

DEAR MAC:

[fol. 554] I just discovered today that we had failed to send you a check with our statement. I am enclosing cashier's check for $688.35, as the balance due you on your account.

Silver is going up right along, but it has a long way to go yet before it reaches the top. You had better get in and get some more before you lose out altogether.

Yours very truly, Jack. J. R. Walsh.

Encl—1.
MR/W.

The testimony in support of its admission given by the witness Louis C. McCaslin was in full substantially as follows:

This is a letter from John Walsh. I received it through the mails at Port Orchard. The second portion is the envelope the letter came in. I took the letter out of the envelope.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. No sufficient foundation was laid for its introduction in evidence. It was a third party record.

2. No showing was made that defendant placed, or caused said Exhibits to be placed in the United States mails.

3. No evidence was admitted to establish or bind defendant with liability for the use of the United States mails in the mailing of such Exhibit.

4. The use of the United States mails in the sending thereof was not shown to have been wrongful, fraudulent, or in the execution of a scheme to defraud, as charged in the indictment.

[fol. 555] 5. That said Exhibit constitutes hearsay evidence against and prejudicial to the defendant.

XI

The Court erred in admitting in evidence, and in denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 52, being the basis of Count III of the Indictment, as follows:

Silver Markets: "Seattle, Shanghai, Bombay, London, New York, Seattle"

Seattle Silver Market

Market Letter

Seattle, Washington, July 13, 1934.

Announcement

The expanding activities of the Seattle Metal Exchange necessitated additional accommodations. Friends and customers may obtain visiting cards for the purpose of inspecting these modern quarters where may be seen facilities connecting the Exchange with the important Silver markets of this country and the Orient. Under special arrangement

with Western Union and the Radio Corporation of America, communication is had with Shanghai, China, in eight minutes. This service takes precedence over all commercial service in America. More than three hundred brokerage firms in Shanghai and vicinity obtain quotation service from Seattle and Seattle brokers have available service from Shanghai with the same rapidity. Silver brokers and customer banks in San Francisco have a regular quotation service from Seattle. It is with a sense of pride and satisfaction in accomplishment that the member brokers of the Seattle Metal Exchange and their associates realize that Seattle has been put upon the Silver map of the World.

Your broker will be pleased to supply you and your friends with visiting cards which will admit you to the floor of the Seattle Metal Exchange. * * *

* * * Any information tendered or any opinion expressed herein is drawn from sources considered reliable, but no responsibility is assumed by us for the accuracy thereof.

[fol. 556] Silver

Perhaps the most important Reconstructive Legislation in modern times—with inconceivable National and International effects—was effected on Tuesday, June 19th, when the President of the United States signed the Silver Purchase Act of 1934. * * *

Silver Purchase Act of 1934

* * * * * * *

Louis Martin Co., Member Seattle Metal Exch., 211 American Bank Bldg., Eliot 3055.

The testimony in support of its admission given by the witness, Frank Givens, was in full substantially as follows:

This is one of the weekly market letters from the Seattle Silver Market. I received it from Louis Martin Company through the United States mails, addressed to Frank Givens, Port Orchard, Washington.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. No sufficient foundation was laid for its introduction in evidence. It was a third party record.

2. No showing was made that defendant placed, or cause said Exhibit to be placed in the United States mails.

3. No evidence was admitted to establish or bind defendant with liability for the use of the United States mails in the mailing of such Exhibit.

4. The use of the United States mails in the sending thereof was not shown to have been wrongful, fraudulent, or in the execution of a scheme to defraud, as charged in the indictment.

5. That said Exhibit constitutes hearsay evidence against and prejudicial to the defendant.

[fol. 557] XII

The Court erred in admitting in evidence, and in denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 32, being the basis of Count IV of the Indictment, as follows:

Norman Edward Company,
Bullion Brokers,
Insurance Building,
Seattle, Washington

Main 7626.

Cable Address "Nored" Seattle.

July 28, 1934.

Frank Anderson, 2021½ Yale North, Seattle, Washington.

DEAR SIR:

The security is impaired upon your contract for the purchase of one September Silver. Due to market conditions, we are compelled to require additional margins in an amount sufficient to protect your account.

Unless these guarantees are given on or before 3:00 P. M., Monday, July 30, 1934, we will sell out your account at the market at 9:30 A. M., Tuesday, July 31, 1934, or as soon thereafter as is possible.

We shall be compelled to hold you liable for any deficit on your account.

Yours truly, Norman Edward Company, by Norman E. Coles, Manager.

NEC:g.

The testimony in support of its admission given by the witness, Norman E. Coles, was in full substantially as follows:

Plaintiff's Exhibit No. 32 is a notice calling for more [fol. 558] margin upon Frank Anderson, a customer. It bears my signature. I don't know by whom it was compiled, nor do I know who dictated it. I think they were prepared under the direction of Mr. Lonergan. They were all made out at the same place. Mr. Frank Anderson was a customer of one of my salesmen. All these notices that are similar were sent through the mail. I don't know where they were dropped in the mail box. I am under the impression the girl who worked in my office did the actual mailing. The actual mailing was under Mr. Lonergan's instructions.

The second portion of the Exhibit was made out in the same place as the letter, in the American Bank Building. I was slightly acquainted with Mr. Anderson. He is dead.

After I became an associate broker, my orders were placed with Louis Martin Company, in the name of Norman Edward Company. I handled my accounts distinctly for my customers as individual, but my account with Louis Martin Company was an aggregate account of the total persons.

Lonergan did not have any interest in the Norman Edward Company.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. No sufficient foundation was laid for its introduction in evidence. It was fourth party record.

2. No showing was made that defendant placed, or caused said Exhibits to be placed in the United States mails.

3. No evidence was admitted to establish or bind defendant with liability for the use of the United States mails in the mailing of such Exhibit.

4. The use of the United States mails in the sending thereof was not shown to have been wrongful, fraudulent, [fol. 559] or in the execution of a scheme to defraud, as charged in the indictment.

5. That said Exhibit constitutes hearsay evidence against and prejudicial to the defendant.

XIII

The Court erred in denying defendant's motion to strike at the close of all the evidence, to which exceptions were taken and allowed, plaintiff's Exhibit No. 29, being the basis of Count V of the Indictment, as follows:

Louis Martin Company,

Bullion Brokers,

American Bank Building,

Seattle, Washington

Eliot 3055.

Cable Address "Lomar" Seattle.

July 30, 1934.

Norman Edward Co., 612 Insurance Bldg., Seattle, Wash.

GENTLEMEN:

Your failure to make satisfactory deposits on your contracts for the purchase of three hundred seventy-two September and three hundred seventy-five December silver will make it necessary for us to liquidate your account.

This is to notify you that unless satisfactory arrangements are made prior thereto, we will sell out your account at 9:30, Tuesday morning, July 31, 1934, or as soon thereafter as we can do so, at the market.

We will be compelled to hold you responsible for any deficit.

Yours truly, Louis Martin Co. J. R. Walsh.

JRW:MLH.

[fol. 560] The testimony in support of its admission given by the witness Norman E. Coles, was in full substantially as follows:

This letter being Exhibit No. 29, is a letter calling for more margins on my firm. It was executed by Louis Martin Company. I cannot swear I received it by mail. It was addressed to Norman Edward Company, and that is my company, and signed by John R. Walsh.

I saw that letter in my own office in the Insurance Building, and received it in the mail from Louis Martin Company. I received it in Seattle, Washington.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. No sufficient foundation was laid for its introduction in evidence. It was a third party record.

2. No showing was made that defendant placed, or caused said Exhibit to be placed in the United States mails.

3. No evidence was admitted to establish or bind defendant with liability for the use of the United States mails in the mailing of such Exhibit.

4. The use of the United States mails in the sending thereof was not shown to have been wrongful, fraudulent, or in the execution of a scheme to defraud, as charged in the indictment.

5. That said Exhibit constitutes hearsay evidence against and prejudicial to the defendant.

XIV

The Court erred in admitting in evidence, and in denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 11, being the basis of Count VI of the Indictment, as follows:

[fol. 561]

Louis Martin Company,
Bullion Brokers,
American Bank Building,
Seattle, Washington
Eliot 3055.
Cable Address "Lomar" Seattle, Wash.

July 30, 1934.

Mrs. Lillian J. Lyman, Assembly Hotel, Seattle, Washington.

DEAR MADAM:

Your failure to make satisfactory deposits on your contracts for the purchase of five December Silver will make it necessary for us to liquidate your account.

This is to notify you that unless satisfactory arrangements are made prior thereto, we will sell out your account

at 9:30, Tuesday morning, July 31, 1934, or as soon thereafter as we can do so, at the market.

We will be compelled to hold you responsible for any deficit.

Yours truly, Louis Martin Company. J. R. Walsh.

JRW:g.

The testimony in support of its admission given by the witness W. G. Coventry, was in full substantially as follows:

Exhibit No. 11 is a letter of Louis Martin Company, the signature of Mr. John R. Walsh. It is a form letter. I do not know the exact number of letters which were prepared and compiled following that same form, but I have seen at least a dozen of them. I have seen this letter in the possession of Mrs. L. J. Lyman, my mother-in-law, who resides at the Assembly Hotel in Seattle.

I do not know that that exact letter was mailed. Letters [fol. 562] of this identical form were mailed. They were mailed by Louis Martin Company. I do not know which particular employee mailed the letters sent in the due course of business. The other portion of that exhibit is a special delivery on a letter addressed to Mrs. L. J. Lyman, carrying the address of the sender as the American Bank Building, Seattle, Washington. The whole thing was handed intact to me by Mrs. Lyman. In fact, it was opened in my presence, in the Assembly Hotel, and this is the envelope from which that letter was taken.

I was working for Louis Martin Company at the time this letter was supposed to have been mailed, and there were three stenographers and Mr. Walsh who were the only four people I think could possibly have mailed that letter, unless it was mailed by one of the other brokers associated with Louis Martin Company at the time.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. No sufficient foundation was laid for its introduction in evidence.

2. No showing was made that defendant placed, or caused said Exhibit to be placed in the United States mails.

3. No evidence was admitted to establish or bind defendant with liability for the use of the United States mails in the mailing of such Exhibit.

4. The use of the United States mails in the sending thereof was not shown to have been wrongful, fraudulent, or in the execution of a scheme to defraud, as charged in the indictment.

5. That said Exhibit constitutes hearsay evidence against and prejudicial to the defendant.

[fol. 563] XV

The Court erred in admitting in evidence, and in denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 30, being a letter on the letterhead of Norman Edward Company, dated August 23, 1934, and being the basis of Count VIII of the Indictment, as follows:

Mr. J. I. Romer, 510 Second Avenue, Seattle, Washington.

DEAR MR. ROMER:

This is to advise you that the condition of your account for the purchase of twenty-four September Silver is such as to be greatly impaired, and we are hereby demanding additional security.

You are hereby notified to deposit with us the sum of Three Thousand Seven Hundred Twelve Dollars and Forty-one cents ($3,712.41), on or before 10:30 A. M., Monday, August 27, 1934.

In the event of your failure so to do, your account will be closed and your contracts sold at the market subject to and under the provisions of the terms of your agreement with us.

Yours truly, Norman Edward Company, by Norman E. Coles.

NEC:MEL.

I do hereby acknowledge receipt of the foregoing letter.

J. I. Romer.

There was enclosed with letter, in the same envelope, a purported carbon copy of another letter, as follows:

[fol. 564] August 23, 1934.

Norman Edward Co., 612 Insurance Bldg., Seattle, Wash.

GENTLEMEN:

This is to advise you that the condition of your account for the purchase of eighteen December Silver and twenty-five September Silver is such as to be greatly impaired, and we are hereby demanding additional security.

You are hereby requested to deposit with us the sum of Twelve Thousand Seven Hundred Forty-six Dollars and Forty-eight cents ($12,746.48), on or before 10:30 A. M., Monday, August 27, 1934.

In the event of your failure so to do, your account will be closed and your contracts sold at the market, subject to and under the provisions of the terms of your agreement with us.

Yours truly, Louis Martin Co. (Signed) J. R. Walsh.

JRW:MLH.

The testimony in support of its admission given by the witness, Norman E. Coles, was in full substantially as follows:

It is a letter sent to Mr. Romer, asking him for additional margins. It bears my signature. I have seen it at 211 American Bank Building. I don't know who did the actual typing. It was dictated by Mr. Lonergan, and sent by mail. The attached portion is a copy of a letter which I received from Louis Martin Company, August 23rd, asking for additional margin. It was sent with this letter to show that the call had been made upon me. The third portion of the exhibit is the envelope in which these two were sent. They were mailed from Seattle, Washington.

[fol. 565] I took a copy of it to my personal attorney, Walter F. Meier, before I sent it out. Mr. Lonergan went up and talked to Mr. Meier, because I refused to send it out. I sent that out as a matter of law. I was told I had to do it by Mr. Meier, to comply with the requirements as a broker. I don't know of any authority Lonergan had to order me to do anything, except when it came to sending out those notices.

After I became an associate broker, my orders were placed with Louis Martin Company, in the name of Norman

Edward Company. I handled my accounts distinctly for my customers as individual, but my account with Louis Martin Company was an aggregate account of the total persons. Lonergan was interested in building up volume as a whole, but not in any particular affairs of the brokers, or their agents.

Mr. Lonergan was the nominal head of the Seattle Silver Exchange. His advice was generally sought by all the brokers and associate brokers, and salesmen, as to matters of policy, forms to be used. He had no interest in my commissions. He never held any position with Norman Edward Company. Primarily my interest in making inquiries of Lonergan was to be sure that I complied with the rules and regulations of the exchange. His advice was simply accepted because of my confidence in him, and because of my respect for his knowledge on the subject.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. No sufficient foundation was laid for its introduction in evidence. It was a fourth party record.

2. No showing was made that defendant placed, or caused said Exhibit to be placed in the United States mails.

3. No evidence was admitted to establish or bind defend-
[fol. 566] ant with liability for the use of the United States mails in the mailing of such Exhibit.

4. The use of the United States mails in the sending thereof was not shown to have been wrongful, fraudulent, or in the execution of a scheme to defraud, as charged in the indictment.

5. That said Exhibit constitutes hearsay evidence against and prejudicial to the defendant, issued subsequent to termination of alleged plan.

XVI

The Court erred in admitting in evidence, and denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 75, being a letter on the letterhead of Battle, Hulbert, Helsell & Bettens, as follows:

August 17, 1934.

Mr. Pierce Lonergan, 211 American Bank Building, Seattle, Washington.

DEAR SIR:

We are attorneys for Mr. A. M. Atwood who for approximately the last year and a half had been buying and selling silver on the Seattle Metal Exchange, through Louis Martin Company, silver brokers.

During the middle of July last, Mr. Atwood had on hand silver futures, as follows:

1,000 ounces September
2,000 " "
2,000 " March, 1935

with a total credit margin of $324.93, in cash.

By reason of an alleged dumping of several hundred thousand ounces of silver on the Seattle market at approximately that time, the market was driven down each day to the maximum permitted under the law, with the result that on July 28th, Louis Martin Co., advised Mr. Atwood that an extra margin requirement was necessary to maintain his silver options and that it must be put up not later than Monday, July 30th, and failing to do so, would necessitate the selling of his silver options at the market. [fol. 567] After conferences with Mr. Pierce Lonergan and Mr. J. P. Walsh, Mr. Atwood deposited $400.00 in the Trust Department of the First National Bank, as an extra margin, conditioned upon the performance of your contract and by the delivery by you of 3,000 ounces of September option silver bullion .999 fine and 2,000 ounces of March option silver bullion .999 fine.

Mr. Atwood thus had covered the required margins. On Monday, August 6th, Mr. Atwood had a conference with Mr. Pierce Lonergan, wherein Mr. Lonergan informed Mr. Atwood that the Seattle Metal Exchange was broke; that Louis Martin Co. was broke and that there was an impending law suit involving about $150,000, which suit would tie up all the funds in Louis Martin Co. and the Seattle Metal Exchange and that Mr. Atwood had better hurry and get his $400 deposit back before these litigants tied it up and attached it, Mr. Lonergan at that time informing Mr.

Atwood that the attorneys for such litigants were in conference and that the suit would be started immediately. Accordingly, Mr. Atwood attempted to reach Mr. Walsh in order to secure a release of his deposit at the First National Bank and was unable to do so on that day.

On August 9th, however, Mr. Atwood reached Mr. Walsh, who made arrangements for Mr. Atwood to take back his $400 deposit in the First National Bank. Mr. Atwood took Mr. Walsh's letter authorizing the withdrawal of the $400 deposit and obtained such deposit.

Within an hour after Mr. Atwood had withdrawn his deposit and sold his silver options at Mr. Lonergan's and Mr. Walsh's pleadings, the President proclaimed the nationalization of silver at 50.01.

The allegations and persuasions made by Mr. Pierce Lonergan and Mr. J. P. Walsh to Mr. Atwood were obviously fraudulently made and were made solely with the intent to get Mr. Atwood out of the market in order to buy his silver at a low price in order that the same might be sold upon the nationalization of silver, which latter event Mr. Pierce Lonergan had been expecting for some time.

Reference is here made to Rem. Rev. Stat. of the State of Washington No. 2477, and as attorneys for Mr. A. M. Atwood, and pursuant to said statute, we herewith demand that the Seattle Metal Exchange and Louis Martin Company, or either, or both, furnish Mr. Atwood a written statement containing the names of the persons to whom his silver options were sold, the time when, the place where, the amount of, and the price at which the same was sold. You may comply with this demand by furnishing the same within 48 hours to the writer, at this office.

You are further advised that Mr. A. M. Atwood was defrauded by the misrepresentations of Mr. Pierce Lonergan and Mr. J. P. Walsh and that he will seek legal redress, if necessary, to recover his damages sustained by him by reason of such fraudulent misrepresentations.

Yours very truly, Battle, Hulbert, Helsell & Bettens,
by Joseph E. Gandy.

JEG:AC.

[fol. 568] The testimony in support of its admission given by witness A. M. Atwood and Joseph Gandy, is substantially as follows:

A. M. Atwood testified that this is a letter from my attorney, Joseph Gandy, addressed to Pierce Lonergan. I saw it before it had been sent out of Mr. Gandy's office. It is a copy.

The witness, Joseph Gandy, testified—that is a copy of a letter I wrote under date of august 17, addressed to Pierce Lonergan referring to the relationship and dealings between Mr. A. M. Atwood and the Louis Martin Company and the Seattle Metal Exchange. I was Mr. Atwood's attorney. I transmitted this to Pierce Lonergan and a copy to the Louis Martin Company under registered mail return receipts. I have the return receipts. Witness refers to the return receipt of Pierce Lonergan letter and the one for the Louis Martin Company letter.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. It was hearsay evidence, contained conclusions of third parties, and happened subsequent to the termination of the alleged plan.

2. It was a self serving statement of a third party making the statements therein contained.

3. It was incompetent, irrelevant and immaterial, and in its nature highly prejudicial to the defendant. Its admission was not necessary to clarify 76-A, and it was not related to 76-B.

XVII

The Court erred in admitting in evidence, and denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 76-A, as follows:

[fol. 569] Louis Martin Company,

Bullion Brokers,

American Bank Building,

Seattle, Washington

Eliot 3055

Cable Address "Lomar", Seattle.

August 20, 1934.

Battle, Hulbert & Helsell, 10th Floor Exchange Building, Seattle, Washington.

Attention Mr. Joseph E. Gandy

GENTLEMEN:

Following is the information requested by you regarding the transactions for the account of Mr. A. M. Atwood on August 9, 1934.

Option	Price	Amount	Sold to
6 Sept.	44¢	$1320.00	Jordan Co.
4 March	44¢	880.00	Jordan Co.

These transactions took place at Seattle, Washington. Any further information you may wish, please advise us.

Yours truly, Louis Martin Co. J. R. Walsh—(M. L. H.)

JRW: MLH.

The testimony in support of its admission given by the witness, Joseph Gandy, was in full substantially as follows:

This is the response that I received from the Louis Martin Company in reply to my letter of August 17, 1934. It was received through the United States mail by myself personally, and by my stenographer who handed it to me.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. It was not a part of the res gestae in this case.

[fol. 570] 2. It referred to a past transaction, and had no connection with the defendant, Lonergan. It was third party record.

XVIII

The Court erred in admitting in evidence, and denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 76-B, as follows:

Louis Martin Company,

Bullion Brokers,

American Bank Building,

Seattle, Washington

Eliot 3055.

Cable Address "Lomar", Seattle.

August 21, 1934.

Mr. A. M. Atwood, % John Davis & Co., Seattle, Washington.

DEAR SIR:

Your communication of the 19th day of August, making certain statements through your attorneys regarding the manner in which your Silver contract account with Louis Martin Co. had been handled, has been received.

This is to advise you that upon your depositing with us the sum of two thousand two hundred and thirty-eight dollars & seventy-five cents ($2,238.75) representing ninety per cent (90%) of the contract price of the Silver contracted by you, your account will be reinstated for the amount of Silver and at the price contracted by you, provided, however, that you comply with the terms, conditions and provisions upon which you originally contracted the Silver and particularly the terms of your contract as evidenced by your signature card.

The deposit of $2,238.75 with us must be made by you on or before noon, Thursday, August 23, 1934.

Sincerely yours, Louis Martin Co., by J. R. Walsh—(M. L. H.)

The testimony in support of its admission given by the witnesses, A. M. Atwood and Joseph Gandy, was in full substantially as follows:

[fol. 571] A. M. Atwood testified, this is a letter dated August 21st from Louis Martin Company, signed by John R. Walsh, and addressed to me, in care of John Davis & Company, Seattle. The letter came to me personally. I received it through the mails. It is a reply to a letter from me of August 19, 1934.

Joseph Gandy testified, the letter of August 17, 1934, was the only letter addressed at any time to Mr. Lonergan or Louis Martin Company.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. It was not a part of the res gestae in this case.

2. It referred to a past transaction, and had no connection with the defendant, Lonergan. It was a third party record.

3. It was not in response to any letter admitted in evidence, and particularly not in response to Exhibit No. 75.

XIX

The Court erred in denying defendant's motion to strike the testimony of W. G. Coventry of a conversation with John R. Walsh of Louis Martin Company, in the absence of defendant, to which exceptions were taken and allowed, in full substantially as follows:

Mr. Walsh told me his whole position was under the control and direction of Mr. Lonergan, even in connection with the affairs of the Louis Martin Company, of which he was president. The statement was made in April, 1934, before the break in the market.

This conversation between John R. Walsh and the witness W. G. Coventry was not admissible for the following reasons:

1. It was not a statement in furtherance of any scheme to [fol. 572] defraud, being merely a narrative of a past event, and not within the rule which admits statements by one defendant in the absence of another.

2. There was no proof established of any scheme to defraud between Walsh and Lonergan.

3. The admission of such conversation was highly prejudicial to the defendant.

XX

The Court erred in denying defendant's motion, to which exceptions were taken and allowed, of statements of W. G. Coventry, as follows:

Defendant told me that a California syndicate had purchased a considerable amount of silver through the firm of P. A. Jordan & Company, who had become tired of holding this silver, as they thought the investment had not increased in value sufficiently rapidly. That the California syndicate that morning had dumped 200,000 ounces of silver futures on the market to be sold. This conversation occurred on July 27, 1934.

This statement of the witness W. G. Coventry was not admissible for the following reasons:

1. The indictment charged the defendant devised a scheme to depress the market in silver. This testimony was not relevant or material to prove a break in the spot market.

2. There was no evidence that the price of silver went down, but to the contrary there was indisputed evidence that the price of silver did not go down at any time.

3. That the evidence was highly prejudicial to the defendant in this case.

[fol. 573] 4. The evidence offered was in variance to the scheme charged in the indictment to depress the market in silver.

XXI

The Court erred in admitting testimony of Luella K. McFaddin, and in denying defendant's motion to strike, to which exceptions were taken and allowed, as follows:

Norman E. Coles of Norman Edward Company told me that he could invest my money and be absolutely positive that I would not lose my principal, and be certain that I would make some money. Mr. Coles said that Lonergan and Walsh both had said it was perfectly safe for me to go ahead and invest my money in silver futures for the purpose we both had in mind. The purpose was to take a master's degree at Columbia University.

The statement of the witness Luella K. McFaddin was not admissible for the following reasons:

1. No showing was made that the defendant was present, or that Coles sustained any such relationship to the defendant, as would render such conversations admissible against defendant.

2. That such conversation was hearsay evidence, and highly prejudicial to the defendant.

XXII

The Court erred in the admission of evidence, and denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 90, consisting of four checks from McGill & Company to defendant, Pierce Lonergan, individually, all in similar form, but different amounts, one of which is as follows:

[fol. 574]

19-11-12.

No. 247.

The Bank of California,

National Association,

Seattle, Washington

Seattle, Washington, 4-25, 1934.

Pay to the Order of Pierce Lonergan $400.00

The Sum * * * 400 Dol's 00 Cts (perforated) Dollars.

Gill & Co., by Helen Latimer.

Endorsement on back: Pierce Lonergan.

The testimony of plaintiff in support of its admission by cross-examination of the defendant, was as follows:

I identify the checks and their endorsements. Did not know what the particular transactions were. They did not represent any margin turned over to me by McGill & Company. I never saw the margin turned over by even the member brokers. I did not know what those checks were. The checks are made payable to me or cash, signed by McGill & Company, by Louis McGill, drawn on the Bank of California.

The reasons such exhibits were not admissible in evidence are as follows:

1. That said evidence was immaterial and irrelevant to any issue in the case and prejudicial to the defendant.

2. No transactions to which they refer were identified or established.

3. That no connection with any particular transactions material to any count of the indictment was shown to exist.

4. No showing of any other transactions that would be an offset to such transaction.

[fol. 575]

XXIII

The Court erred in the admission of evidence, and denying defendant's motion to strike, plaintiff's Exhibit No. 91, consisting of five checks from Louis Martin Company to defendant, Pierce Lonergan, individually, all in similar form, but different amounts, to which exceptions were taken and allowed, one of which checks is as follows:

19-28-12.
No. 787.

The Pacific National Bank of Seattle

Seattle, Washington 6/6 1934.

Pay to the Order of Pierce Lonergan $1100.00
The Sum * * * * * 1100 Dol's.00 Cts. ..... Dollars.
Louis Martin Co., by J. R. Walsh, Pres.

Endorsement on back: Pierce Lonergan.

The testimony of plaintiff in support of its admission, by cross-examination of defendant is substantially as follows:

I identify the checks bearing my endorsement. They were drawn on the Pacific National Bank by Louis Martin Company. They were payable. I do not know what the checks were for, but would presume from the endorsement to the Trust Department it was in connection with the silver that was being held down in San Francisco, or might be in connection with the payment on the purchase price of Shanghai dollars. They did not represent margins that were deposited by Louis Martin Company clearing house account. There is nothing there to indicate it, and I wouldn't know. I made checks payable to McGill

& Company and Louis Martin Company and the other brokers from my own account. There were such transactions.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

[fol. 576] 1. That said evidence was immaterial and irrelevant to any issue in the case and prejudicial to defendant.

2. No transactions to which they refer were identified or established.

3. That no connection with any particular transaction material to any count of the indictment was shown to exist.

4. No showing of any other transaction that would be an offset to such transaction was made.

XXIV

The Court erred in admitting the testimony of Mildred Spear Carroll and in denying defendant's motion to strike, to which exceptions were taken and allowed, as follows:

I never receovered any portion or portions of the $6,000.00 invested by myself.

The statement of the witness was not admissible for the following reasons:

1. It constituted no element of the crime charged.

2. It was irrelevant, incompetent and immaterial.

3. It was highly prejudicial to the defendant.

4. The defendant had in no way been connected with the transaction in which said losses, if any, had taken place.

5. It was repetition and done for the purpose of inflaming the jury.

XXV

The Court erred in admitting the testimony of Luella K. McFaddin, and in denying defendant's motion to strike, to which exceptions were taken and allowed, as follows:

[fol. 577] I did not recover the $200.00 invested by me on behalf of my father, U. S. McFaddin.

The statement of the witness was not admissible for the following reasons:

1. It constituted no element of the crime charged.

2. It was irrelevant, incompetent and immaterial.

3. It was highly prejudicial to the defendant.

4. The defendant had in no way been connected with the transaction in which said losses, if any had taken place.

5. It was repetition and done for the purpose of inflaming the jury.

XXVI

The Court erred in giving that portion of Instruction No. XLIV, referring to dummy and street accounts, to which exceptions were taken and allowed, which Instruction No. XLIV is as follows:

In considering whether the defendant Lonergan intended to mislead and defraud the investors, you should study all the circumstances, and all the acts performed by him, as shown by the evidence admitted before you. There has been testimony as to money solicited on promises of profits of three per cent a month; there has been testimony that the safety of the principal would be guaranteed and that the money paid over by the investors would be kept in a clearing house fund; there has been testimony regarding dummy accounts and transactions and street names; there has been testimony regarding the creation of the market price of silver futures or silver for future delivery on the Seattle market during the last few days of July and early in August of 1934, and of statements and representations made by the Defendant Lonergan and by Walsh in ex- [fol. 578] planation of such creation. All such testimony is to be considered by you fairly and fully, and it is for you to determine first whether such representations and promises and such acts were actually made, or caused to be made by the defendant Lonergan, and if so made, whether they were made honestly, whether he himself believed them and made them in good faith, or whether they were made for the purpose of misleading and deceiving.

The giving of this instruction was erroneous for the following reasons:

1. It stated that evidence had been introduced of transactions of the defendant through dummy accounts.

2. Such statement was highly prejudicial because there was no such evidence introduced of any dummy accounts.

3. No definition was given by the Court of its meaning in the use of such word to show that no dummy accounts had been introduced.

4. In not instructing the jury of the converse that they should also consider evidence of the transactions of the defendant in his own right and name.

XXVII

The Court erred in refusing to instruct the jury, as requested by the defendant, in addition to Instruction No. 38 given by the Court, that, as a matter of law, the effect of the President's Proclamation of August 9, 1934, was to close private silver exchanges in the United States, to which exceptions were taken and allowed.

The reasons that this Instruction should have been given, are as follows:

1. The evidence shows that all contracts had been defaulted by failure of customers to place additional margins. [fol. 579] The President issued his proclamation on August 9, 1934, to nationalize all silver not under contract. After this proclamation the member brokers sought to reinstate the defaulted contracts. Many customers did put up additional margins after default under such reinstatement. No delivery could be made therefor.

The evidence shows that all contracts including contracts which had been defaulted for failure to make marginal payments on call, and all contracts upon which marginal payments were made, and all defaulted contracts which were reinstated were for delivery of silver in September and December 1934 and March 1935.

No trading was done by the Seattle Metal Exchange or by the brokers after August 9, 1934. The effect of the President's proclamation closed the Seattle Metal Exchange on that date.

The Court should have instructed the jury, as requested, instead of leaving it to the jury to determine the effect of the President's proclamation of August 9, 1934.

XXVIII

The Court erred in refusing to instruct the jury, to which exceptions were taken and allowed, Instruction No. 4, requested by defendant, as follows:

I instruct you that that class of transactions called matched orders differs materially from wash sales in that they are actual and enforcible contracts, and where there is no publication of the volume or amount of such transactions they do not constitute fraudulent representations and serve no illegal purpose. Such orders are that class of transaction whereby some person sends a number of orders simultaneously to different brokers, some to buy and some to sell, and these brokers without knowing that other brokers have countervailing orders from the same prin- [fol. 580] cipal execute them and the transactions become binding contracts between the brokers.

The reasons such instruction should have been given are as follows:

All the transactions made the basis of this prosecution were executory contracts. They could not involve so called wash sales, but did involve matched orders on future contracts.

This instruction informed the jury that under circumstances therein stated, which were shown by defendant's evidence, such matched orders served no illegal purpose and were binding contracts between the brokers.

The Court having instructed on "wash sales" should have also defined "matched orders", as requested.

XXIX

The Court erred in refusing to instruct the jury, to which exceptions were taken and allowed, Instruction No. 71, requested by defendant, as follows:

I instruct you, members of the jury, that a "wash sale" is defined as a transaction in which there is no passing of the beneficial title. It is a representation of a transaction passing title to property in the present from an anonymous or fictitious seller to a buyer. I instruct you that there is no evidence in this case of a present sale on the futures market of the Seattle Metal Exchange, and therefore the term "wash sale" does not apply to the transactions presented to you in the evidence here.

The reasons such instruction should have been given are as follows:

The Instruction No. XXXIII, given by the Court, defined "wash sales." The Court, however, did not go further, as requested, and advise the jury that there was no evidence

of a present sale on the futures market of the Seattle Metal Exchange, and therefore the term "wash sale" did not [fol. 581] apply to the transactions presented in the evidence in this case.

XXX

The Court erred in denying defendant's motion to withdraw the case from the jury and declare a mistrial, to which exceptions were taken and allowed.

The reason such motion should have been granted, is as follows:

Such a prejudicial atmosphere had been created on the part of the United States Attorney that the defendant could not have a fair trial, in view of the repeated instances brought out by the Government, purely for the purpose of prejudicing the jury, all of which had no bearing on this case to which matters exceptions had been taken and allowed.

XXXI

The Court erred in admitting the testimony of J. I. Romer, and in denying defendant's motion to strike, to which exceptions were taken and allowed as follows:

Mr. McKnight told me that the silver market was absolutely a positive fact to make a little money. That it was just as good as a bank, and in fact better.

The statement of the witness, J. I. Romer, was not admissible for the following reasons:

1. No showing was made that the defendant was present, or that McKnight sustained any such relationship to the defendant as would render such conversation admissible against defendant.

2. It was hearsay and highly prejudicial to the defendant.

XXXII

The Court erred in admitting testimony of Mary E. McGrew, and in denying defendant's motion to strike, to which exceptions were taken and allowed, as follows:

[fol. 582] Mr. McKnight told me everything good and rosy, which made me believe. He told me it was perfectly and absolutely good and safe.

The statement of the witness, Mary E. McGrew, was not admissible for the following reasons:

1. No showing was made that the defendant was present, or that McKnight sustained any such relationship to the defendant as would render such conversation admissible against defendant.

2. It was hearsay and highly prejudicial to the defendant.

XXXIII

The Court erred in denying the defendant's motion for an order striking from the record and directing the jury to entirely disregard the testimony of all investor witnesses relating to representations made by Norman E. Coles, or by salesmen of Norman Edward Company, to which exceptions were taken and allowed.

The reasons such order should have been given to the jury to disregard such testimony are as follows:

1. There is not sufficient foundation to show that such representations were authorized by the defendant.

2. There was no showing made that such representations were made in the presence of the defendant, or with his knowledge and consent, or that the defendant ratified the making of such representations.

3. The testimony of the Government's witness, McKnight, by which plaintiff is bound, expressly shows that the defendant neither authorized, was present at, nor ratified such representations.

XXXIV

The Court erred in denying defendant's motion to strike the investor testimony, to which exceptions were taken and allowed.

[fol. 583] The reasons such testimony should not have been admitted, and should have been stricken, are as follows:

1. There is no sufficient foundation to warrant consideration of said testimony by the jury.

2. Said representations were not shown by any evidence whatever to have been false, fraudulent, or made for the purpose of furthering a scheme to defraud by defendant.

3. Such testimony is irrelevant, immaterial, having no bearing on the issues involved, and having no probative value.

XXXV

The Court erred in denying defendant's motion for an order striking from the record, and directing the jury to disregard all testimony relating to representations, statements, assurances or promises made to investors, dealing with or through Louis Martin Company, to which exceptions were taken and allowed.

The reasons such order should have been given to the jury to disregard such testimony are as follows:

1. No sufficient foundation was shown that the defendant expressly authorized, consented to, or ratified any of the representations testified to.

2. No showing was made that defendant was present at any of the conversations between the brokers or salesmen or representatives of Louis Martin Company and said investors so as to bind the defendant by such representations.

3. No showing was made that the defendant had any control over, or any influence with the persons alleged to have made such representations.

[fol. 584] 4. The representations alleged to have been made were expressly contrary to the printed matter, rules and regulations and written data having heretofore been received in evidence.

5. None of the alleged representations testified to were shown by the Government to be false, fraudulent, or made for the purpose of furthering the alleged scheme to defraud.

6. Such testimony is irrelevant, immaterial, being wholly foreign to the issues involved herein, and having no probative value whatever.

XXXVI

The Court erred in denying defendant's motion for an order striking from the record, and instructing the jury to entirely disregard the testimony of Norman E. Coles and W. G. Coventry, concerning conversations with, or representations by the defendant, Pierce Lonergan, in any way relating to representations thereafter made by the said Coles or Coventry to investors, to which either said Coles or Coventry or investors have disputed, to which exceptions were taken and allowed.

The reasons such order should have been given to the jury to disregard said testimony are as follows:

1. None of said conversations or representations have been shown to be untrue, false, fraudulent, or made by defendant for the purpose of furthering a scheme to defraud.

2. It is irrelevant and immaterial, being wholly foreign to the issues herein involved, and having no probative value whatever.

XXXVII

The Court erred in denying defendant's motion for an order striking from the record, and instructing the jury to entirely disregard all testimony offered and received on behalf of the Government, given by the investor witnesses, [fol. 585] brokers or salesmen relating to moneys lost in transactions with said brokers, or with transactions concerning silver futures contracts, and relating to the amount of losses sustained by investors, or others, through transactions in silver futures contracts, and relating to the amount of so called margins paid to brokers, and relating to the recovery or failure to recover said margins, or any of the same, to which exceptions were taken and allowed.

The reasons such order should have been given to the jury to disregard such testimony are as follows:

1. It was irrelevant, immaterial and incompetent, and without sufficient foundation to bind the defendant, having no probative value.

2. It was offered and introduced by the plaintiff solely for the purpose of prejudicing the jury against the defendant.

3. Consideration of such evidence and testimony by the jury was prejudicial to the defendant, so as to prevent him from having a fair trial.

XXXVIII

The Court erred in denying defendant's motion for an order striking from the record, and instructing the jury to entirely disregard all evidence and testimony of each and every witness examined by or on behalf of the plaintiff, relating to representations of any kind made by, author-

ized by, consented to, or ratified by the defendant, to which exceptions were taken and allowed.

The reasons such order should have been given to the jury striking such testimony, are as follows:

1. None of the representations testified to have been shown by the plaintiff to have been false, untrue, fraudulent, [fol. 586] or made for the purpose of furthering a scheme to defraud.

2. It was irrelevant, immaterial, had no bearing on the issues herein, and having no probative value whatever.

3. Consideration thereof by the jury was highly prejudicial to the defendant, having been offered by the plaintiff solely for the purpose of prejudicing the jury.

XXXIX

The Court erred in denying defendant's motion for an order striking from the record, and instructing the jury to entirely disregard any and all testimony, evidence or inference of the breaking of the Seattle silver futures market, or of the offering upon the Seattle Metal Exchange by defendant of 200,000 ounces of silver, or any volume thereof, or of the offering upon said Seattle silver futures market, or Seattle Metal Exchange 25,000 ounces of silver, to which exceptions were taken and allowed.

The reasons such order should have been given to the jury to disregard such testimony are as follows:

1. The testimony of the plaintiff's witness, George Goggin, expressly establishes the fact that no offering of 200,000 ounces of silver was ever made upon the Seattle silver futures market, nor upon the Seattle Metal Exchange.

2. The testimony and evidence of the witness, Goggin, establishes the fact that an offer to sell 25,000 ounces of silver, or any part thereof, for future delivery, made by the said George Goggin upon the 31st day of July, 1934, was made solely for the purpose of determining the price at which silver futures could be sold upon the Seattle Market, and for no other purpose.

[fol. 587] XL

The Court erred in denying defendant's motion for an order striking from the record, and instructing the jury

to entirely disregard the testimony and evidence of, or Exhibits relating to, the several alleged accounts of use of the United States mails, for the purpose of furthering the alleged scheme to defraud, to which exceptions were taken and allowed.

The reasons such order should have been given to the jury to disregard such testimony and exhibits, are as follows:

1. There was no sufficient foundation for the introduction and receipt of such evidence and exhibits to establish the fact nor to bind the defendant with liability for the alleged use of the United States mails, in connection with any use thereof.

2. It affirmatively appears from the testimony of the plaintiff's witnesses adduced that the defendant neither authorized, directed, consented to, nor ratified the use of the United States mails, as alleged in any of the Counts of the Indictment herein, nor as testified to by any of the witnesses for the plaintiff herein.

3. The use of the United States mails as alleged in each Count of the Indictment herein stated were not shown to have been wrongful, fraudulent, nor for the purpose of furthering a scheme to defraud.

4. The use of the United States mails, as alleged in the Indictment and as testified to by the Government's witnesses, were irrelevant, immaterial, wholly foreign to the issues herein involved, and having no probative value.

5. The consideration of all such testimony by the jury constituted unfair prejudice against the defendant.

[fol. 588] Wherefore, the said Pierce Lonergan, Defendant-Appellant in the above entitled cause, by reason of the errors aforesaid, and upon the record in said cause, prays that the said judgment and sentence against him and upon him, the said Pierce Lonergan, under the Indictment herein may be reversed and held for naught.

Carkeek, McDonald & Harris, Carl B. Luckerath, Pierce Lonergan, Attorneys for Defendant-Appellant.

Received a copy of the within Assignments this 13th day of August, 1936.

J. Charles Dennis, Attorney for the U. S.

[File endorsement omitted.]

[fol. 589] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING NOVEMBER 1935 TERM FOR ALL PURPOSES

Now on this 1st day of May, 1936, J. Charles Dennis, United States District Attorney, and Owen P. Hughes, Assistant United States District Attorney, appearing for the plaintiff, and attorneys McDonald, Wilkerson, Luckerath and Ton, appearing for the defendant, this trial is resumed pursuant to adjournment had with the jurors, defendant and counsel all present. * * * At 4:30 P. M. further proceedings in this case are continued until 10 A. M. Tuesday, May 5, 1936, at which time after the convening of the May Term of the Court, the trial will be resumed. As to this case it is ordered that the November 1935 Term be, and hereby is extended. The parties, attorneys and witnesses are excused until the aforementioned time, and the jury is admonished to heed the previous admonition of the Court.

[fol. 590] IN UNITED STATES DISTRICT COURT

ORDER INCORPORATING EXHIBITS IN BILL OF EXCEPTIONS AND WITHHOLDING THEIR TRANSMITTAL — Filed August 4, 1936

This matter coming on for hearing on the stipulation of counsel for the Appellant and Appellee herein, and the Court being advised in the premises, it is hereby,

Ordered, Adjudged and Decreed that the Exhibits which have been received in evidence in the above entitled matter may be and the same are hereby incorporated, and by reference made a part of the proposed Bill of Exception-, and that the same shall be sufficiently identified by setting forth in said proposed Bill of Exceptions the number and a brief description of the Exhibits, which said Exhibits more particularly are described as Plaintiff's Exhibits: Nos. 1 to 11 inclusive; Nos. 13 to 17 inclusive; 19 to 45 inclusive, including 22-A, 22-B, 23-A, 23-B, 24-A, 24-B, 25-B, 26-A, 26-B; Nos. 47 to 57 inclusive; Nos. 59 to 74 inclusive; 75; 76-A, 76-B; 77 to 82 inclusive; and numbers 84-A, 84-B, 84-C, 84-D, 84-E; and Nos. 85 to 91 inclusive. All the foregoing numbered Exhibits being Plaintiff's Exhibits. And in addition thereto, Defendant's Exhibits: Nos. A-1 to A-9 in-

clusive; A-11; A-13 to A-19 inclusive; A-21 to A-39 inclusive; including A-28, A-28-1, A-28-2, A-28-3; A-40-A to A-40-J inclusive; A-43 to A-47 inclusive, including A-46-1, A-46-2, A-46-3 and A-46-4.

It is Further Ordered, Adjudged and Decreed that the [fol. 591] Exhibits received in evidence in the above entitled cause, and more particularly described herein above, shall be forwarded to the Circuit Court of Appeals of the Ninth Circuit, at San Francisco, California, as part of Appellant's transcript of the record in the above entitled matter. That this order sending up said Exhibits incorporated in Bill of proposed Bill of Exceptions, and in the original only is entered into by stipulation of counsel on both sides, and is approved by the Court in view of the voluminous character of the Exhibits, the impossibility of reproducing them satisfactorily within the limits of a Bill of Exceptions, their intrinsic character as brokers' books, records and advertising material, and for other reasons deemed sufficient by this Court rendering their inclusion in said Bill a matter of such great inconvenience as being incapable of being forwarded in any other manner.

It is Further Ordered, Adjudged and Decreed that the said Exhibits, more particularly described herein above, for the convenience of the parties may remain in custody of the Clerk of this Court at Seattle until Monday the 16th day of November, 1936, before being forwarded to the Circuit Court of Appeals, when said Exhibits shall be forwarded to the said Clerk of said Circuit Court of Appeals unless further order or stipulation be entered in the above entitled cause, subject to the further order on this matter by this Court.

Done in open Court this 4th day of August, 1936.

[fol. 592]

John C. Bowen, Judge.

Endorsed: J. Charles Dennis, United States Attorney. Owen P. Hughes, Assistant United States Attorney. Presented by Carkeek, McDonald & Harris, Attorneys for Appellant. Carl B. Luckerath, Attorney for Appellant. Pierce Lonergan.

[File endorsement omitted.]

[fol. 593] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed August 8, 1936

To the Clerk of the Above Entitled Court:

You will please prepare and certify a transcript of record on appeal to the United States Circuit — of Appeals for the Ninth Circuit in the above entitled cause, and include therein the following papers and proceedings. You may eliminate all captions, except in the Indictment, and other introductory matters so far as possible:

1. Indictment.
2. Demurrer of Defendant, Pierce Lonergan.
3. Journal Entry Overruling Demurrer of Pierce Lonergan, and noting exceptions.
4. Arraignment of defendant, Pierce Lonergan.
5. Plea of defendant, Lonergan.
6. Journal Entry—Order Dismissing Counts 7-9 and 10 of the Indictment.
7. Verdict of the Jury.
8. Motion for New Trial.
9. Journal Entry Denying Motion for New Trial, and Noting Exceptions.
10. Judgment and Sentence of Defendant, Pierce Lonergan.
11. Notice for Appeal.
12. Order Granting Permission to Appeal in Forma Pauperis.
13. Order Fixing Time of Courts Direction on Appeal.
14. Appeal Bond of Pierce Lonergan.
15. Docket Entry Showing Date of Entry of Appellants Proposed Bill of Exceptions.
16. Certified Bill of Exceptions.
17. Copy of this Præcipe.

[fol. 594] 18. Order to Treat Motion for New Trial as if Timely Made.

19. Order Extending November 1935 Term for All Purposes herein.

20. Assignments of Error.

21. Order re Incorporation of Exhibits, and withholding transmittal until November 16, 1936.

Dated this 8th day of August, 1936.

Carkeek, McDonald & Harris, Carl B. Luckerath, by Pierce Lonergan, Attorneys for Defendant, Pierce Lonergan.

Received a copy of the within Præcipe this 8th day of Aug. 1936. J. Charles Dennis, Attorney for Pltff.

[File endorsement omitted.]

[fol. 595] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 596] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8218

PIERCE LONERGAN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

MOTION THAT THE CIRCUIT COURT OF APPEALS REMAND THE ABOVE ENTITLED CAUSE TO THE UNITED STATES DISTRICT COURT FOR A NEW TRIAL OR REMAND SAID CAUSE TO THE UNITED STATES DISTRICT COURT WITH DIRECTIONS TO HEAR AND DETERMINE SAID MOTION FOR A NEW TRIAL OR THAT THE CIRCUIT COURT OF APPEALS REMAND THE ABOVE ENTITLED CAUSE TO THE UNITED STATES DISTRICT COURT FOR ARREST OF THE JUDGMENT OR REMAND SAID CAUSE TO THE UNITED STATES DISTRICT COURT WITH DIRECTIONS TO HEAR AND DETERMINE SAID MOTION IN ARREST OF JUDGMENT OR FOR OTHER AND FURTHER RELIEF—Filed July 24, 1936

Comes Now the Appellant, Pierce Lonergan, and petitions this court to enter an order remanding the above entitled cause to the United States District Court in and for the

Western District of Washington, Northern Division, for a new trial or enter an order remanding said cause to the said United States District Court to hear and determine said Pierce Lonergan's motion that he be granted a new trial. Said motion for a new trial is made upon the grounds and for the reasons hereinafter stated.

The appellant further petitions this Court that in the alternative this Court enter an order remanding the above entitled cause to the United States District Court in and for the Western District of Washington, Northern Division, and ordering an arrest of judgment, or that this Court enter an order remanding said cause to the said United States District Court to hear and determine Pierce Lonergan's motion that he be granted an order in arrest of judgment.

Said motion for an order remanding an arrest of judgment, or an order remanding to hear motion for arrest of judgment, is made upon the grounds and for the purposes hereinafter stated.

[fol. 597] This appellant further petitions this Court in the alternative for an order granting such other or further relief to this appellant as is provided by law in such cases. This motion for further relief is made upon the grounds and for the purposes as hereinafter stated.

The petition hereinabove set forth, and motions in pursuance thereof, are made upon the grounds that since the trial of the foregoing cause, and since motion for a new trial, and order denying motion for a new trial made in the United States District Court in and for the Western District of Washington, Northern Division, in the above entitled matter, the appellant, Pierce Lonergan, has discovered new evidence, which is competent, relevant, and material to the issues in said cause, the validity of the verdict and to the motion for a new trial, and the order of the trial court denying the same. This evidence was not evidence that was, or could have been, within the knowledge of said appellant, Pierce Lonergan, at the time of the trial of said cause, the entry of said verdict, nor the argument of motion for a new trial, and the entry of the order thereon by the trial court; that this evidence points conclusively to the invalidity of said verdict and misconduct of the jury, and of individual jurors in arriving at the said verdict.

That said newly discovered evidence, and said evidence of misconduct points conclusively, and with certainty to the

fact that the jury considered facts not material to the issues of this case, nor adduced at the trial; but that lay within the particular knowledge of specially trained members or member of the jury which was not within the common knowledge of the jorors, and which extraneous facts stated by the specially trained jurors were prejudicial to the appellant, Pierce Lonergan; that these facts resulted in, and did change, the votes of other jurors, and resulted in a verdict of guilty, which otherwise would not have been found by the jury. The evidence further points conclusively to the fact that extraneous expressions of the jurors beyond matters and facts properly in evidence before the jurors caused other members of the jury to change their vote of not guilty, to guilty, to the prejudice of this appellant; that [fol. 598] the evidence points conclusively to a gross misconduct, and to the disregard by a large number of the jurors of their oath to be convinced beyond a reasonable doubt; that the said jurors during their deliberation in arriving at a verdict, and since the rendition and filing of said judgment, were not convinced beyond a reasonable doubt, and are not now, and at no time have been convinced beyond a reasonable doubt of the guilt of this appellant; that the said jurors so deported and conducted themselves in open defiance and disregard of their oaths and obligations as jurors as to effect and cause other jurors to change their vote of not guilty, to guilty.

That the facts herein presented show a condition and state of facts which bring the matter within the exception to the general rule of law applying to impeachment of verdicts by the affidavits or testimony of jurors; that the exception herein invoked has been heretofore recognized by the Supreme Court of the United States, and applies in this matter.

That said newly discovered evidence, and said evidence of misconduct on the part of jurors could not have been adduced at the time of the entry of the verdict in the trial of said cause by the exercise of proper and due diligence, nor could the same have been adduced at the time of filing the motion for new trial, nor the argument by appellant thereon, nor prior to the entry of the trial court's order in denial of the motion for new trial.

That the said evidence is presented and produced herewith for the first time pursuant to the exercise of due

diligence consistent with the requirements of the showing necessary to invoke the extraordinary power of this Court to remand the cause to the District Court for a new trial upon newly discovered evidence, or evidence of gross misconduct of the jury, or to remand the cause to the District Court, and direct said Court to hear and determine a motion for a new trial, upon newly discovered evidence, or evidence of gross misconduct of the jury. Said showing required being one that demonstrates clearly that the extraordinary power should be invoked in order to avoid a great injustice.

That all of said newly discovered evidence, and evidence [fol. 599] of misconduct of the jury could not have been adduced in time for a motion in arrest of judgment by the exercise of proper and due diligence, but that the same is presented and produced herewith for the first time pursuant to the exercise of due diligence consistent with the requirements of the showing necessary to invoke the extraordinary power of this Court to remand the cause to the District Court for an order in arrest of judgment upon gross misconduct of the jury, or to remand the cause to the District Court, directing said Court to hear and determine a motion for an order in arrest of judgment upon evidence of gross misconduct of the jury, said showing required being one that demonstrates clearly that the extraordinary power should be invoked in order to avoid a great injustice.

That all of said newly discovered evidence and evidence of gross misconduct of the jury is such as to show such a flagrant breach of the duties and obligations of the jury and jorors, as to warrant this Court to enter an order granting relief to this petitioner and appellant from a gross miscarriage of justice.

This motion is made upon the minutes of the Court, and the records and proceedings in the above entitled cause, and upon the affidavits hereto attached and made part of this motion.

Carkeek, McDonald & Harris and Carl Luckerath & Eugene Tong, Attorneys for Appellant, Pierce Lonergan.

[fol. 600] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF LEO S. GURNERS

Leo S. Gurners, being first duly sworn, on oath deposes and says:

That he was one of the jurors who served and rendered a verdict in the case of United States of America vs. Pierce Lonergan and John R. Walsh, in the above entitled court, in Cause No. 43515, which said verdict as to the defendant Lonergan, was guilty; that this affidavit is made in the furtherance of justice and to disclose the matters occurring in the jury room during the deliberation of the jury, to-wit:

That upon assembling in the jury room, a Mr. Rogers was elected by the members of the jury as foreman. It was then declared that the jury should cast their ballots as to the guilt or innocence of the defendant Lonergan, whereupon one of the jurors stated that he did not have a sufficient understanding of the facts to justify him in casting a ballot; immediately several of the jurors announced that the facts presented in the evidence were so technical and complex that no ballot should be case by the jury; that the case was one which should properly be decided by the Judge. Several of the jurors then expressed their opinion that there was no one who was not an expert capable to intelligently pass upon the facts of the case. Several of the jurors stated that they were unable to give a fair opinion on the case, and joined in a request that the matter be referred back to the Judge because of the unusual facts in the case, and the jurymen's lack of familiarity with the conditions involved and the facts disclosed in the evidence. Another juror advised that it was the duty of the jurors [fol. 601] to reach a verdict for themselves, and that they must proceed to do so as the Judge would not consider any request of the jury to refer the matter back to the Judge. One of the jurors then declared that she could reach no decision whatever unless she could see the books of account which had been introduced in evidence; that she was a bookkeeper and might be able to make up her mind from the books and certain checks which had been introduced. Be-

fore the arrival of the books and after some discussion among the jurors in which it was stated to the jurors generally that they had to make up their minds one way or the other, whether they understood the case or not, an initial ballot was taken showing eight for conviction and four for acquittal. Several of the jurors voting guilty explained that they did so because they did not remember any evidence showing what disposition had been made of the money received by the defendant and other brokers. Argument took place among the jurors as to who got the money and what it was used for, several of the jurors expressing the belief that most of it was used by the Government's witness Coles, but that for some reason the defendant, Lonergan, had not shown how much, and that therefore they considered they would have to hold the defendant, Lonergan, responsible, due to the fact that he had failed to explain entirely the distribution of the money received.

During this time various books and charts and other documents were brought into the jury room. One of the women jurors, a Mrs. French, being the one who had declared herself a bookkeeper, and who requested the right to examine the account books, began to examine the account book of Pierce Lonergan Co. While she was so engaged some of the other jurors began examining certain charts. None of the jurors were able to explain the meaning of these charts in connection with the testimony, and all agreed that they did not understand them.

Only the initial ballot was taken before the jury went to dinner. After dinner, Mrs. French continued her examination of the Lonergan & Co. Books. She declared that she was trying to find where the checks, amounting to about $6,000, given by Gill & Company and Louis Martin Company to Pierce Lonergan, had been entered in the books, these checks being the ones identified by Mr. Lonergan during his cross-examination by the Government's attorney. [fol. 602] Several ballots were taken by the jury after dinner without any change of vote. None of the jurors seemed able to point to any specific act of wrongdoing, but expressed their judgment as being based upon facts which they stated they assumed would be fraudulent unless the whole plan of operation was understood, and admitted that they did not understand how the business in which Mr. Lonergan was engaged should be conducted.

After considerable time Mrs. French stopped her examination of the Lonergan books, and without examining any of the other account books declared that in all her experience as a bookkeeper she had never seen such a set of books, but that it was apparent to her that the checks for $6,000 had not been entered in the Lonergan books which she had examined, but that in any business these checks for $6,000. should have been entered in the Pierce Lonergan & Co. books; that the fact that they were not showed that there was a fraudulent intent in the way the Lonergan & Co. books were kept, and that this was enough to prove fraud by the defendant and enough to convict him.

Whereupon another ballot was taken by the jury; two of the jurors changed their votes and the ballot then stood ten to two for conviction.

Discussion continued for some hours later when one of the jurors who lives in Everett declared that he had an $8.00 a day job waiting for him, and that the jurors who were voting were just bull-headed, and asked that they change their verdict so that he could get back to his job;

Whereupon one of the other jurors announced that he had just obtained a new job at Longview, Washington, and that unless he got to it he would lose it; that it meant $9.00 a day to him, and he wished for God's sake that the jurors who were voting for acquittal would change their vote so he could get out and get his job.

These remarks were addressed particularly to this affiant who had been unable to meet the arguments that Mrs. French's examination of the books showed there was fraud in the way the books were kept, and that she was a bookkeeper and ought to know, and unless this affiant was able to meet her statements, that he should not deprive the other jurors of the chance to get back to their jobs and to their eight and nine dollars a day pay.

[fol. 603] Due to the statement of Mrs. French as to her experience and knowledge of books as a bookkeeper, and affiant being unable to refute her statements, he relied upon them, and changed his vote for acquittal to one of guilty.

Whereupon one of the other jurors changed his vote, and the verdict became unanimous for guilt.

Under the instructions of the court a verdict was drawn up, signed by the foreman and sealed in the envelope, and

the jury went home that night, leaving the sealed verdict in the possession of the foreman. The following morning the jury returned to the court and the verdict was presented in the presence of the jury and read in court.

Leo S. Gurners.

Subscribed and sworn to before me this 10th day of June, 1936. F. J. Wettreck, Notary Public in and for the State of Washington, residing at Seattle. (L. S.)

[fol. 604] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOHN W. RAFFERTY

John W. Rafferty, being first duly sworn, on oath deposes and says: That he is one of the jurors who served and rendered a verdict in the case of United States of America vs. Pierce Lonergan and John R. Walsh in the above entitled Court, in cause No. 43515, which said verdict as to the defendant, Lonergan, was guilty. That this affidavit is made in the furtherance of justice to disclose matters occurring in the jury room during the deliberations of the jury, to-wit:

That after the assembly of the jury in the jury room, a foreman was elected by the jurors, and then a request made that a ballot of the jurors be cast indicating each juror's opinion as to the guilt or innocence of the accused, Pierce Lonergan;

After several ballots had been cast and discussed by the jurors this affiant stated to the other jurors that he believed that it was not a case for the jurors to decide, as the evidence that had been introduced in the trial was so technical, and evidently was about such an unusual kind of business that it was no case for a jury to decide, but that in his opinion it was a case that should be decided by a Judge or by experts who understood that kind of business; that this opinion of affiant was concurred in by others of the jury; and this affiant states that at this time and at all times he is and has been of the same opinion.

This affiant further states that during the course of the discussions in the jury room there had been brought in to

the jurors, documents, letters and books of account, which had been introduced in evidence, and during the deliberations of the jury one of the women, a Mrs. French, [fol. 605] examined the books of account of Pierce Lonergan & Company. This juror stated that she had experience as a bookkeeper and wanted to find the entries of certain checks in the books of Mr. Lonergan; these checks were about four in number and had been introduced in evidence by the Government during the cross-examination of Mr. Lonergan; that they were made out by Gill and Company and Martin & Company to Pierce Lonergan. Mrs. French spent a considerable length of time examining the books of Pierce Lonergan & Company, and at the conclusion of her examination stated that the checks did not appear as entries in the Lonergan books, and further stated in substance to the effect that said checks should have been entered in said books, or ought to have been entered in the books if the books were honestly kept; the exact words of the juror this affiant does not recall, but from her statements this affiant understood and believed her to state that the fact that said entries of these checks were not made in the Lonergan & Company books constituted evidence of fraud or dishonest intent on the part of the defendant, and failure to enter them was not honest and proper bookkeeping.

This affiant further states that considerable discussion was had by the jurors regarding charts which had been introduced in evidence, and about practices of operating the business of the different companies, and from the statements of the jurors it was evident that they lacked a thorough and proper understanding of the manner in which the silver futures business should be properly conducted, and during the course of deliberations several of them so stated from time to time.

This affiant further states that in his opinion the statement of Mrs. French on the point of the failure to enter checks in the account book of Lonergan & Company, affected certain of the jurors, and that it did positively affect the opinion of this affiant, and was instrumental in causing him to change his vote from not guilty to guilty.

John W. Rafferty.

Subscribed and sworn to before me this 15th day of June, 1936. Bertha L. Geis, Notary Public in and for the State of Washington, residing at Seattle. (L. S.)

[fol. 606] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

AFFIDAVIT OF DONALD A. McDONALD

Donald A. McDonald, being first duly sworn, on oath deposes and says: That he is the attorney of record in the above entitled matter; that he was present, and tried the above entitled cause as attorney for appellant during the trial of said case, in the District Court of the United States, for the Western District of Washington, Northern Division; that he is well and personally acquainted with the facts hereinafter stated; that the indictment in the foregoing cause was returned by the grand jury on the 8th day of December, 1934; that thereafter, and on the 16th day of April, 1936, the appellant, Pierce Lonergan, entered his plea of not guilty to said indictment; that on the same day, to-wit, April 16, 1936, the appellant, Pierce Lonergan's demurrer to the indictment was argued, and overruled by the Honorable John Bowen, United States District Judge, presiding; that upon said date, appellant's motion to dismiss the indictment was overruled by the said Court; that thereafter, and on the same day, to-wit, the 16th day of April, 1936, appellant, Pierce Lonergan, was placed on trial on the said indictment, and that thereafter, on the 17th day of April, 1936, a mistrial was declared by the said Honorable John Bowen, United States District Judge, and the case re-set for trial on the 21st day of April, 1936; that upon said date, to-wit, April 21st, 1936, the appellant, Pierce Lonergan, was placed on trial on said indictment; that thereafter, to-wit, on the 1st day of May, 1936, the said District Court entered an order extending the November, 1935 term of the Court for all purposes of this trial and cause; that thereafter, to-wit, on the 15th day of May, 1936, a verdict of guilty was returned by the jury against the said appellant on counts I, II, III, IV, V, VI, and VIII; that on the 20th day of May, 1936, [fol. 607] appellant filed his motion for a new trial, and said motion was heard on its merits, and an order denying the same entered by the said District Judge on the 28th day of May 1936; that upon the same date, to-wit, May 28th, 1936, the United States District Court imposed judgment and

sentence against the said Pierce Lonergan, sentencing him to the United States Penitentiary at McNeil Island for a period of three (3) years on each of the counts, I, II, III, IV, V, VI, and VIII, to run concurrently, and ordered judgment against the said appellant for costs.

That on the 28th day of May, 1936, appellant filed his Notice of Appeal, and on said date, the said United States District Court entered an order allowing the appeal in forma pauperis, fixed bond, and signed a citation on said appeal.

That on the 22nd day of June, 1936, said District Court, by the Honorable John Bowen, United States District Judge, made an order extending the time for the service and filing of the bill of exceptions and assignments of error to August 15th, 1936;

That all of the foregoing facts appears from the records and proceedings in the above entitled cause;

That this affiant further states that the copy of said indictment hereto attached, and marked Exhibit I, is a full, true, and correct copy of the indictment in the said cause, and is incorporated herein and made a part hereof by reference thereto.

That this affiant further states that during the course of the trial, no evidence was adduced showing that payments, represented by checks amounting to about $6,000.00, made to Pierce Lonergan individually by Gill & Co. or by Louis Martin & Co. were for the account of Pierce Lonergan & Co., or should be entered in or shown by the books of Pierce Lonergan & Co., or that the same should have been, or were intended to be paid to him for the account of said Company by Louis Martin & Co., or Gill & Co., or that he was accountable, or responsible, to the Pierce Lonergan & Co. for funds or money paid to him individually by Louis Martin & Co., or Gill & Co.

This affiant further states that thereafter, and on or about the 5th day of June, 1936, this affiant was informed by the [fol. 608] appellant that that day — had heard rumors regarding conduct and statements of the jurors, and which indicated that there had been gross irregularities in the proceedings and deliberations of the jurors in arriving at their verdict, and said appellant sought the advice and opinion of this affiant; that this affiant advised said appellant to con-

tact the jurors, if possible, and determine what had taken place during the deliberations of the jury in said cause and action.

That this affiant has been well and personally acquainted with the appellant, Pierce Lonergan, for a period of more than fifteen (15) years, and knows that prior to the verdict of the jury in the above entitled cause that said appellant, Pierce Lonergan, enjoyed an enviable reputation in the City of Seattle for his ability and capacity as a lawyer, for his civic activities in the community and for his outstanding distinction as a scholar and business executive.

That this affiant interviewed some of the jurors and from such interviews, and the reading of the affidavits of other of the jurors obtained by appellant, Pierce Lonergan, this affiant states that the facts therein disclosed indicate a gross misconduct on the part of the said jurors in arriving at their verdict, of such nature as to call for the use of the extraordinary power of this Court in making exception to the general rules of law applicable to the impeachment of verdicts of jurors, and in order to prevent a gross miscarriage of justice.

That this affiant makes this affidavit in support of the motion to remand made in the above entitled cause.

Donald A. McDonald.

Subscribed and Sworn to before me this 23rd day of July, 1936. Carl B. Luckerath, Notary Public in and for the State of Washington, residing at Seattle.

(Clerk's Note.—Indictment referred to in this affidavit already appears in certified transcript, and is not again copied; but reference is made to where such indictment appears.)

[fol. 609] In United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted]

Affidavit of Pierce Lonergan

Pierce Lonergan, being first duly sworn, on oath deposes and says: That he is the appellant in the above entitled matter; that he is an American citizen, born in Boston, Mas-

sachusetts, on April 13, 1891, is a graduate of the University of Washington Law School, graduating in the year of 1914 with the degree of Bachelor of Law; that since said date, he has been, and now is an active and practicing attorney, with offices in Seattle, Washington, admitted to practice before the Supreme Court of said State; that for a number of years last past, he was admitted to practice law in the State of California, and has, for a number of years, been admitted to, and has practiced law before the United States Supreme Court.

That at no time previous to the indictment issued by the grand jury in the above entitled matter, has he ever been indicted, arrested, or convicted for any crime whatsoever.

That he is an officer in the United States Army, has the rank of Major, Quartermaster Reserve Corps, and has an assignment of duties which make him one of the ranking officers in the Ninth Corps area in the division to which he is assigned, which assignment he holds by reason of the outstanding experience as a lawyer and Army officer.

That this affiant did not know, and had no means of knowing of any irregularities or misconduct of the jury in arriving at their verdict, until on or about the 5th day of June, 1935, when this affiant was advised by a fellow member of the Seattle Bar Association that a client of said lawyer had discussed with him the matter of the verdict in this affiant's case, and from the statement made, it seemed that the jurors had wantingly and grossly disregarded their oaths and [fol. 610] duties in arriving at the verdict, whereupon this affiant attempted, on advice of counsel, to contact the said jurors, but was unable to locate come at the addresses given; others were away from their residences, or employed elsewhere, or refused to make affidavit, but stated their willingness to testify in court if the judge so ordered, and stated to this affiant that they would testify in substance to the facts set out in the affidavit of the jurors, John W. Rafferty and Leo S. Gurners, which affidavits are hereto attached, and filed in support of the motion to remand.

Pierce Lonergan.

Subscribed and Sworn to before me this 22nd day of July, 1936. Carl B. Luckerath, Notary Public in and for the State of Washington, residing at Seattle. (PL).

[File endorsement omitted.]

[fol. 611] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER SUBMITTING MOTION TO REMAND CAUSE, ETC.—August 3, 1936

Ordered motion of appellant to remand cause to District Court for new trial, or for arrest of judgment, or remand with directions to hear and determine said motion in arrest of judgment, or for other relief, submitted on behalf of appellant on motion papers filed, and argued by Mr. J. Charles Dennis, United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

[fol. 612] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING MOTION TO REMAND CAUSE—August 10, 1936

Upon consideration thereof, and by direction of the Court, to whom this matter was submitted, It Is Ordered that the motion of appellant for a remand of this cause to the District Court for hearing of petition for new trial, etc., be, and hereby is denied.

[fol. 613] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER OF SUBMISSION—February 1, 1937

Ordered appeal in above cause argued by Messrs. Oscar L. Willett and Donald McDonald, counsel for appellant, and by Mr. J. Charles Dennis, United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

[fol. 614] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—March 5, 1937

By direction of the Court, Ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 615] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8218

PIERCE LONERGAN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

Before: Wilbur, Garrecht and Mathews, Circuit Judges

OPINION—Filed March 5, 1937

MATHEWS, Circuit Judge:

Appellant was convicted and sentenced on seven counts of an indictment charging violations of § 215 of the Criminal Code (18 U. S. C. A. § 338), which provides: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States * * *, shall be fined not more than $1,000, or imprisoned not more than five years, or both."

There are 40 assignments of error. Three of the assigned errors (assignments 2, 3 and 30) are not specified in appellant's brief, as required by our Rule 24, and are therefore disregarded.

[fol. 616] Assignment 1 is that the trial court erred in overruling appellant's demurrer to the indictment and to each count thereof. The grounds of appellant's demurrer

are (1) that the indictment does not in any count thereof state facts sufficient to constitute an offense against the laws of the United States, and (2) that the allegations of each count are so vague, indefinite and uncertain as not to apprise appellant of the true nature of the accusation against him.

The allegations of count 1, so far as material, are copied in the margin.[1] Except as to form and contents of letters,

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[1] Count 1 alleges: "That heretofore and prior to the several acts of using the United States mails hereinafter set forth, [appellant] and John R. Walsh, * * * hereinafter in this indictment called defendants, had devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from [certain named persons] and divers other persons to the grand jurors unknown, all hereinafter in this indictment called investors, and being of the class of persons whom the said defendants believed they might induce to open margin accounts for trading in silver for future delivery; the said scheme and artifice being in substance and effect as follows, to wit:

"The said defendants, being engaged in the alleged silver brokerage business at Seattle, Washington, under the firm names of Pierce Lonergan and Company, Louis Martin and Company, Gill and Company, and P. A. Jordan and Company, and operating the so-called Seattle Silver Market under the name of the Seattle Metal Exchange, would represent themselves and their said firms to the public as silver brokers of financial responsibility and standing, worthy of the confidence of the said investors and well qualified and in a position to advise them regarding investments in silver futures, and would advise and urge the said investors to open accounts with them, the said defendants, and their said firms, and to purchase silver on margin for future delivery, and pay over to the said defendants their money on marginal payments therefor; and for the purpose of inducing the said investors to open such accounts, and purchase such silver futures on margin, the said defendants would pretend and represent that the Seattle silver market was entirely reliable and responsible and functioning in connection with the great silver markets at New

[fol. 617] names and addresses of persons to whom they were mailed, and dates of mailing, the other counts are similar to count 1. Each count alleges that, having devised a scheme to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, defendants, for the purpose of executing said scheme, placed in the Seattle post office a letter addressed to a person within the United States, to be sent and delivered by the post office establishment of the United States.

It is contended by appellant that the indictment is insufficient, in that it fails to allege that the representations which the scheme contemplated would be made were actually made, or that the other acts which the scheme contemplated

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York, London, Shanghai and Bombay, and with prices following such markets; that the prices on the said Seattle Silver Market could not break substantially below such world markets because in case of an emergency such world markets would come to the support of the said Seattle exchange; that small investors could trade on the said Seattle market more advantageously than on the New York market because they could here purchase in smaller lots; that the price of silver was certain to advance and profits from purchase thereof would be practically certain; that investors ought to buy silver as a protection against inflation, because inflation was coming but an investor owning silver would not be adversely affected thereby; that assets in the form of silver would be as liquid as a bank account and more safe; that an investment could be made with as little as a $50.00 down payment; that all the money paid in by investors on margin contracts was either used to purchase silver for future delivery on investor's contracts, or was held in a special clearing house fund until required in settlement of such contracts; and that any investment in silver through the said defendants and their said firms, and through the said Seattle market would be absolutely safe for the said investor.

"Whereas, in truth and in fact, as the said defendants then and there well knew, the said defendants and their firms were not brokers of financial responsibility and standing, worthy of the confidence of the said investors, but were impecunious, financially irresponsible and without resources

[fol. 618] would be done were actually done. No such allegation was necessary. The gist of the offense was not the making of representations or the doing of other acts which the scheme contemplated, but the use of the mails for the purpose of executing the scheme. Redmond v. United States (C. C. A. 1), 8 F.(2d) 24, 28; United States v. Quimby (C. C. A. 2), 51 F.(2d) 167, 170; Whitehead v. United States (C. C. A. 5), 245 F. 385, 388; Cochran v. United States (C. C. A. 8), 41 F. (2d) 193, 197; Rude v. United States (C. C. A. 10), 74 F.(2d) 673, 675. Each count of the indictment sufficiently charges a violation of § 215 of the Criminal Code.

There is no merit in appellant's contention that the indictment is too indefinite and uncertain. It charges the

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or ability to fulfill their commitments, and without qualifications for advising anyone regarding investments of any sort; the said Seattle Silver Market as operated by the said defendants would not be and was not reliable and responsible, and was not functioning in conjunction with the silver markets of the world, and prices thereon could not be depended upon to follow the world markets, but the said Seattle Market would be and was governed by the manipulations of the said defendants and their accessories; the representations regarding the desirability of investments in silver would be and were made only to lead investors to trade with the said defendants to their loss; it was true that the said defendants would accept subscriptions for only small amounts of silver, and would accept small margin payments thereon, but they would do so only for the purpose of enticing small and inexperienced investors into the speculative trading and to pay over their money to the said defendants, and the funds received by the said defendants on such accounts would not be and were not all used to purchase silver or covered into a trust fund, and would not be and were not held for the future settlement with investors on their contracts, but would be and were appropriated and consumed by the said defendants in their operations and would be lost to the said investors.

"And it was a further part of the said scheme and artifice that when the said defendants should reach a point in their said operations where they could no longer conceal their shortages, they, the said defendants, would take

[fol. 619] offense with sufficient particularity (1) to apprise appellant of what he must be prepared to meet and (2) to make the judgment a bar to a second prosecution for the same offense. Nothing more was required. Hagner v. United States, 285 U. S. 427, 431; Greenbaum v. United States (C. C. A. 9), 80 F.(2d) 113, 116; Wheeler v. United States (C. C. A. 9), 77 F.(2d) 216, 218; Johnson v. United States (C. C. A. 9), 59 F.(2d) 42, 44; Crane v. United States (C. C. A. 9), 259 F. 480, 482. Appellant's demurrer was properly overruled.

Assignment 4 is that "The court erred in denying [appellant's] motion for an order requiring the Government to elect upon which one of the two schemes, charged in the indictment, [appellant] was to be tried." The motion was as follows (appellant's counsel speaking): "One other motion.

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steps deliberately and fraudulently to depress the price of silver on the said Seattle market far below the legitimate price, and would demand from said investors large additional sums of money to protect their accounts, well knowing that most of said investors would be unable to comply with such demands and so would have their equities wiped out, and said defendants would thus be able to close out the accounts of all excepting a very small number of such investors, and the said defendants intended so to defraud and would and did so defraud the said investors.

"And the said defendants, so having devised and intending to devise the scheme and artifice aforesaid, for the purpose of executing the same scheme and artifice and attempting so to do, * * * did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in the United States Post Office at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, to be sent and delivered by the Post Office establishment of the United States, a certain letter in an envelope with postage thereon duly prepaid then and there addressed to Mr. Frank Givens, Port Orchard, Washington, the said letter so enclosed in said envelope being then and there in words and figures as follows, to wit: [setting forth the letter]; * * * contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

It has been my conviction since the first time I saw this indictment that it charges two schemes. The first charge was that they [defendants] were just going to get this money and steal it. The other scheme was that they were going to rig the market. At this time I move * * * that the Government be required to elect on which of the two schemes [appellant] is to be tried."

The motion was not well founded. The indictment does not charge any scheme to steal money nor any scheme to rig the market. It charges "a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises." Appellant now contends that this constituted two schemes—(1) a scheme to defraud and (2) a scheme to obtain money by false and fraudulent pretenses, representations and promises—and that the Government should have been required to elect upon which of these schemes it would rely. The two last mentioned schemes were not mentioned or referred to in appellant's motion. Whether they were two schemes or one, and whether, if two, the Government could or should have been required to elect between them, are questions which, not having been raised in the trial court, are not before us and will not be considered.

Twenty-eight assignments (numbered 5, 9 to 25, inclusive, and 31 to 40, inclusive) are to the admission of and refusal to strike out evidence. The assignments do not indicate that any of this evidence was objected to in the trial court. They do not state what objections, if any, were made, nor the grounds thereof, nor the grounds, if any, on [fol. 620] which appellant moved to strike out the evidence. Such assignments do not conform to our Rule 11 and will not be considered. Cody v. United States (C. C. A. 9), 73 F. (2d) 180, 184; Goldstein v. United States (C. C. A. 9), 73 F. (2d) 804, 806.

Assignment 6 is that the trial court erred in denying appellant's motion for a directed verdict. The denial was proper. The scheme described in the indictment was proved, substantially as alleged.[2] There was substantial evidence that appellant devised the scheme and, for the purpose of executing it, mailed the letters set forth in the indictment, or caused them to be mailed. A detailed statement of the evidence would serve no useful purpose. We

[2] See footnote 1.

have examined it all and find that it amply warranted submission of the case to the jury.

Assignment 7 is that the trial court erred in denying appellant's motion for a new trial. This is not a valid assignment. The denial of a motion for a new trial is not reviewable on appeal. Goldstein v. United States, supra, p. 807.

Assignment 8 is that the court erred in pronouncing judgment and sentence upon appellant. This assignment is too general to merit consideration. Oras v. United States (C. C. A. 9), 67 F.(2d) 463, 465.

Assignment 26 is that "The court erred in giving that portion of instruction No. 44,[3] referring to dummy and [fol. 621] street accounts, to which exceptions were taken and allowed * * *" There was only one exception to this instruction. It was as follows: "I want to except to

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[3] The court's charge consisted of 57 numbered instructions. Instruction No. 44 was as follows: "In considering whether the defendant Lonergan intended to mislead and defraud the investors, you should study all the circumstances, and all the acts performed by him, as shown by the evidence admitted before you. There has been testimony as to money solicited on promises of profits of three per cent a month; there has been testimony that the safety of the principal would be guaranteed and that the money paid over by the investors would be kept in a clearing house fund; there has been testimony regarding dummy accounts and transactions alleged to have been made by the defendant through such dummy accounts and street names; there has been testimony regarding the creation of the market price of silver futures or silver for future delivery on the Seattle market during the last few days of July and early in August of 1934, and of statements and representations made by the defendant Lonergan and by Walsh in explanation of such creation. All such testimony is to be considered by you fairly and fully, and it is for you to determine first whether such representations and promises and such acts were actually made, or caused to be made by the defendant Lonergan, and if so made, whether they were made honestly, whether he himself believed them and made them in good faith, or whether they were made for the purpose of misleading and deceiving."

the instruction in which your Honor commented about the money being solicited on a three per cent a month basis, dummy accounts, and I cannot remember all the instruction, but stating that as a one-sided and unfair comment on the evidence. I know your Honor has a right to comment, but I think your Honor should state the converse as well." There was no merit in this exception. Instruction No. 44 did not misstate or unfairly comment on the evidence. If appellant wished the court to "state the converse," he should have proposed an instruction embodying the desired statement. Not having done so, he cannot complain of the court's failure to give such an instruction.

Assignment 27 is that "The court erred in refusing to instruct the jury, as requested by [appellant], in addition to instruction No. 38 given by the court, that, as a matter of law, the effect of the President's proclamation of August 9, 1934, was to close private silver exchanges in the United States." The record shows no such request. It shows an exception to the trial court's failure to give the additional instruction here referred to, but no request that such additional instruction be given. Error cannot be predicated upon refusal of a request not shown to have been made. Levine v. United States (C. C. A. 9), 79 F. (2d) 364, 371.

Assignments 28 and 29 are to the refusal of requested instructions. Assuming, without deciding, that these were correct statements of law, it does not follow that, in refusing them, reversible error was committed. Error, to be reversible, must be shown to have been prejudicial. Walton v. Wild Goose Mining & Trading Co. (C. C. A. 9), 123 F. 209, 219. To show prejudice in the refusal of requested instructions, it must be shown that there was evidence to which such instructions were properly applicable. Sweeney v. Erving, 228 U. S. 233, 242; Bird v. United States, 187 [for 622] U. S. 118, 132; Brett v. United States (C. C. A. 9), 86 F.(2d) 305, 308; National Bank of Commerce v. United States (C. C. A. 9), 224 F. 679, 683.

Appellant has not made or attempted to make any such showing. He has pointed out no evidence to which the requested instructions might have been applied. The burden of searching the record for such evidence rested upon appellant's counsel and should not be assumed by this court. Walton v. Wild Goose Mining & Trading Co., supra.

No prejudice being shown, none will be presumed. Brett v. United States, supra.

Judgment affirmed.

[File endorsement omitted.]

[fol. 623] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT

No. 8218

PIERCE LONERGAN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

JUDGMENT—Filed March 5, 1937

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[File endorsement omitted.]

[fol. 624] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—May 10, 1937

Upon consideration thereof, and by direction of the court, It is Ordered that the petition of appellant, filed April 3, 1937, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[fol. 625] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—Filed May 10, 1937

Upon application of Messrs. Oscar L. Willett, Horace W. Danforth and Pierce Lonergan, counsel for the appellant, and good cause therefor appearing, it is Ordered that the issuance under Rule 32, of the mandate of this Court in above cause be, and hereby is, stayed to and including June 14, 1937; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

Curtis D. Wilbur, United States Circuit Judge.

Dated, San Francisco, California, May 10, 1937.

[File endorsement omitted.]

[fol. 626] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 627] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: In forma pauperis. File No. 41,602. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 121. Pierce Lonergan, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed June 8, 1937. Term No. 121, O. T., 1937.

FILE COPY

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FILED
JUN 8 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT
OF THE
UNITED STATES.

October Term, 1936
No. 121

PIERCE LONERGAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

PIERCE LONERGAN,
317 W. M. Garland Bldg., Los Angeles, California,
Petitioner in Pro Per.

Donald A. McDonald,
Carl B. Luckerath,
Empire Building, Seattle, Washington.
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Horace W. Danforth,
317 W. M. Garland Building, Los Angeles, California.
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No.....

PIERCE LONERGAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

A.

History of the Case.

Petitioner and one John R. Walsh were indicted for mail fraud under Section 215 of the Criminal Code (18 U. S. C. A. Sec. 338) [R. 2, *et seq*]. The indictment

was originally in ten counts, but three of them were dismissed at the close of the government's case [R. 322]. Petitioner was tried separately [R. 27], and convicted by a jury on the remaining seven counts. Motion for new trial was denied May 28, 1936, and petitioner was sentenced to three years' imprisonment in a Federal penitentiary on each count, sentences to run concurrently [R. 33]. On appeal to the Circuit Court of Appeals for the Ninth Circuit [R. 35] the Court affirmed the conviction on March 5, 1937 [R. 614], and denied a rehearing on May 10, 1937 [R. 624].

The charging in the several counts of the indictment, except in names of the parties affected, is:

> "That Pierce Lonergan and John R. Walsh * * * devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from" (certain named persons) * * * "and * * * for the purpose of executing the said scheme and artifice and attempting so to do * * * did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in the United States Post Office at Seattle" certain letters.

A copy of the material parts of the indictment appear in connection with the opinion of the Circuit Court now reported in 88 Fed. (2d) 591, at pages 592 and 593.

B.

Facts Involved.

Upon the trial, despite objections of petitioner, much evidence, both oral and documentary, was continually admitted upon the theory, as charged in the indictment among other things, that petitioner had "engaged in the silver brokerage business at Seattle" under four several firm names, and in the course of such business, through such firms and their agents and salesmen, he had made false and fraudulent representations to "investors," and had also taken steps "fraudulently to depress the price of silver on said Seattle Market." The rulings of the trial court in the above matters were made the subject matter of assignments of error upon the appeal [R. 550, 566-571]. In one particular instance, a letter dated August 17, 1934, was offered. It was identified by the writer, Joseph Gandy, member of a prominent Seattle law firm, as the copy of a letter written to the defendant, on behalf of a client, Atwood [R. 262]. This witness stated that he had sent a copy of this to Louis Martin Co. [R. 263], which had dealt with Atwood, and which was one of the four firms charged to have been operated by petitioner. This letter became Exhibit 75 [R. 267], and is set out as a Supplement hereto, page I. When first offered, petitioner's objections were amplified by the Court itself. In so many words, the Court then stated that the instrument was "self-serving," and "after the event" [R. 264]. And denied it admission. Thereupon, over objection, the Government introduced two other letters, Exhibits 76-A [R. 265] and 76-B [R. 266], copies of which also appear in the Supplement hereto, pages III and IV. Neither was written by petitioner. Neither refers to Exhibit 75.

And 76-B, in terms, refers to and was identified as a reply to another letter entirely [R. 261]. Exhibit 75 was then admitted [R. 267].

In part, that exhibit recites:

> "The allegations and persuasions made by Mr. Pierce Lonergan * * * to Mr. Atwood were obviously fraudulently made and were made solely with the intent to get Mr. Atwood out of the market * * * You are further advised that Mr. A. M. Atwood was defrauded by the misrepresentations of Mr. Pierce Lonergan * * * he will seek legal redress, if necessary, to recover his damages sustained by reason of such fraudulent misrepresentations" [R. 533-534].

Motions were made to strike this exhibit; and to instruct the jury to disregard it; but they were denied [R. 267].

There was continually introduced throughout the trial over defense objections, hearsay testimony, highly prejudicial, of the type of that of the witnesses McFaddin [R. 184], McGrew [R. 210], and Romer [R. 211].

Regarding the assignments based on all of the errors above mentioned, the Circuit Court in its opinion held:

> "28 assignments (numbered 5, 9 to 25, inclusive, and 31 to 40, inclusive) are to the admission of and refusal to strike out evidence. The assignments do not indicate that any of this evidence was objected to in the trial court. They do not state what objections, if any, were made, nor the grounds thereof, nor the grounds, if any, on which appellant moved to strike out the evidence. Such assignments do not conform to our rule 11 and will not be considered. Cody v. United States (C. C. A. 9), 73 Fed. (2d) 180, 184; Goldstein v. United States (C. C. A. 9), 73 Fed. (2d) 804, 806." [R. 619.]

II.

REASONS FOR ALLOWANCE OF THE WRIT.

1. In a criminal case, where the petitioner had been convicted of a felony and sentenced accordingly, it was error for the Circuit Court of Appeals to refuse to consider "plain error," regardless of any rules of court, and the decision of the court is in probable conflict with the decision of this Court in *Shepard v. United States,* 290 U. S. 96, 103, 78 L. ed. 196; *Williams v. Great Southern Lumber Co.,* 277 U. S. 19, 72 L. ed. 761; *United States v. River Rouge Imp. Co.,* 269 U. S. 411, 421, 70 L. ed. 339, 346; *Brasfield v. United States,* 272 U. S. 448, 450, 71 L. ed. 345, and related cases, as well as with its own decisions in *Paddock v. United States,* 79 Fed. (2d) 872, 874, and related cases; justifying and requiring the exercise of the supervisory powers of this Court.

2. In such a case, the decision of the Circuit Court in sanctioning the admission in evidence by the trial court of self-serving declarations, opinion evidence going precisely to the very basis of the crime charged, to-wit, fraud, violates the constitutional rights of the petitioner under the Fifth and Sixth Amendments to the Constitution, by denying him a fair and impartial trial by due process of law in accordance with established procedure, and decides a federal question in conflict with applicable decisions of this Court, particularly *Shepard v. United States,* 290 U. S. 96, 103, 78 L. ed. 196, 201; *Brasfield v. United States,* 272 U. S. 448, 450, 71 L. ed. 345, 346; *New York Central Railroad Co. v. Johnson,* 279 U. S. 310, 318-319, 73 L. ed. 706, 710-711; and related cases.

3. In such a case, it was error for the Circuit Court to refuse to consider assignments of error based on the

admission of hearsay evidence (Nos. XXI, XXXI and XXXII) for the stated reason that such assignments were not in proper form to require consideration under former Rule 11 of that court, and the decision is probably in conflict with that court's former decision in *Meehan v United States,* 70 Fed. (2d) 857, 858, 859; justifying and requiring the exercise of the supervisory powers of this Court.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled "No. 8218, Pierce Lonergan, Appellant, v. United States of America, Respondent," to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of the said Circuit Court of Appeals for the Ninth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated June 5, 1937.

PIERCE LONERGAN,
Petitioner.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No.....

PIERCE LONERGAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

I.

Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was rendered, entered and filed on March 5, 1937, and is reported in Advance Sheets No. 3, April 26, 1937; Volume 88, Federal Reporter (2nd Series) page 591, et seq. The judgment of the United States District Court was not reported.

II.

Jurisdiction.

(1) The judgment to be reviewed was entered March 5, 1937 [R. 623]. A petition for rehearing, duly filed, was denied May 10, 1937 [R. 624]. The time to apply for a writ of certiorari, therefore, runs from May 10, 1937. The petition for certiorari was filed herewith on or before June 14, 1937.

(2) The Federal courts have jurisdiction of all crimes and offenses cognizable under the authority of the United States Judicial Code, Section 24, Paragraph 2, Title 28, U. S. C. A. Section 41. The defendant was indicted and convicted under Title 18, U. S. C. A. Section 338 (Criminal Code Section 215). Appeal to the Circuit Court of Appeals was taken in pursuance of the provisions of Title 28, U. S. C. A. Section 225 (Judicial Code Section 128).

(3) Application to the Court for writ of certiorari is made in pursuance of:

a. Title 28, U. S. C. A., Section 347 (Judicial Code Section 240, 43 Stats. 938).

b. Supreme Court Rule 38, Paragraph 5B.

III.

Regulations Involved.

Circuit Court Rules, Ninth Circuit, Rule 11. (In effect when the appeal herein was taken and perfected.)

IV.

Statement of the Case.

The facts material to the matter involved and the issues raised in the Circuit Court of Appeals have already been stated in the petition, in the "History of the Case," and "Statement of Facts Involved," pages 1-4, which are hereby adopted and made a part of this brief. Incidental facts will be developed in the argument.

V.

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals for the Ninth Circuit erred in refusing to pass upon, and thereby sanctioning, the "plain error" of the lower court in admitting in evidence Exhibit No. 75 (Assignment of Error XVI). Its decision therein (a), was in conflict with decisions of this Court and with its own decisions; and (b), violated petitioner's constitutional rights under the Fifth and Sixth Amendments to the Constitution of the United States.

2. The Circuit Court erred in refusing, on the stated ground of non-conformity to its then Rule 11, to consider assignments of error going to the admission by the trial court of hearsay evidence, which errors involved the very bases of the indictment.

VI.

ARGUMENT.

Prefatory Statement.

The Circuit Court of Appeals erred in refusing to consider, thereby sanctioning, the error of the trial court in admitting Exhibit 75. This trial error was one of substantive law, and not merely of evidentiary rule (Wigmore on Evidence, Vol. 1, 2nd ed., Sects. 2 and 3). As evidence, the lower court at first properly classified, and rejected, this Exhibit. In its ruling upon this exclusion, the court had properly declared it to be opinion evidence and a self-serving statement, no part of the transaction to which it referred, and after the event. Obviously, statements of this Exhibit charge the defendant in direct terms with fraud, and fraudulent representations. These matters of fraud were the basic issues on trial. The determination of these ultimate facts, extra judicially, was an invasion of the province of the jury. A more vulnerable document has but rarely obtained admission as "evidence" in a criminal trial. When it has, it has, heretofore, uniformly been held to be fatal error. We believe the error in this case subject to the principles announced in *Shepard v. United States,* 290 U. S. 96, 103, 78 L. ed. 196, and related cases. The Exhibit was a letter written by an eminent Seattle law firm to the defendant in argumentative and forceful phrases. It related the defendant to a business transaction between a client of the writer and a brokerage firm not the defendant's. In a context of vicious innuendo, the letter states: "The allegations and persuasions made by Pierce Lonergan * * * were obviously

fraudulently made and were made solely with the intent to get Mr. Atwood out of the market * * *" Also: "You are further advised that Mr. A. M. Atwood was defrauded by the misrepresentations of Mr. Pierce Lonergan * * * he will seek legal redress, if necessary, to recover his damages sustained by him by reason of such fraudulent misrepresentations" [R. 533-534]. These damning statements are the *factum probandum* of the case (Wigmore, *supra,* Sec. 2). They assert the "total fact" which was for the sole determination of the jury. The indictment charged the defendant with a scheme to defraud and to obtain money and property by false and fraudulent representations. The writer of this letter, a lawyer probably known to many of the jurors, was on the witness stand while the letter was read to the jury by the district attorney [R. 267-268]. The dramatic effect can easily be conceived as even greater than a denunciatory speech to the jury by the witness in person. Under no rule of evidence could this witness have been permitted to testify that the "persuasions" of the defendant "were obviously fraudulently made," and that his client "was defrauded by the misrepresentations" of the defendant. To permit the same result to be effected indirectly, was equal error, error so fundamental and vital as to violate petitioner's constitutional rights. Petitioner's efforts to have this Exhibit stricken or disregarded were denied [R. 267, 268]. And the situation was consistently aggravated by the admission of hearsay evidence, all of which errors the Circuit Court refused to consider, upon the assigned ground of non-conformity to its then Rule 11, although that position was not consistent with former decisions of the Court.

First Specification of Error.

A. The Admission of Exhibit 75 Was "Plain Error"

The Circuit Court, Eighth Circuit, in *Reineke v. United States*, 278 Fed. 724, involving the larceny of tires from a railroad car, reversed the judgment solely because of admission in evidence of a statement less prejudicial than the letter here. There it appeared that a witness was shown a paper which he said was the original bill of lading issued by a railroad company to a tire company for freight. The court stated, page 726:

> "We are of the opinion that no proper foundation was laid for receiving these papers as evidence * * * they are clearly hearsay, and we think prejudicial to the rights of the defendants * * * We find no other error in the record but on account of the error above mentioned, the judgment must be reversed."

In the case of *Harrison v. United States*, 200 Fed. 662, (C. C. A. 6), a mail fraud case, a letter from the assistant attorney general for the post office department written to the defendant was offered in evidence by the Government. The court says, page 673:

> "'Parts were excluded, however, but enough was received and read by the jury to make clear either by express statement or by inference that this official had decided the Easy Way Washer business to be a fraudulent rather than a legitimate business * * *'"

And further said, page 674:

> "Whether the business as evidenced by the circulars and advertising was legitimate or fraudulent was one of the issues for the jury; and obviously what the attorney general had decided or had said on that

> subject was primarily inadmissible * * * While we may concede that the letter was not wholly immaterial upon the subject of intent, it was at best remote in point of time and of uncertain effect in this respect. Whatever materiality it might have is subordinate to and merged in its more objectionable and injurious character as evidence. The minor bearing on intent would necessarily be inseparable from the major wrongful effect of the recited decision; and the limitations made and instructions given by the court as to the force which could be permitted to this letter, could not, we think, operate to prevent serious harm flowing from its reception to respondent's rightful interests."

In *Berry v. United States,* 15 Fed. (2d) 634, (C. C. A. 5), a mail fraud case, over objection of the accused, the court admitted in evidence a petition for the appointment of a receiver in the bankruptcy proceedings, which petition was prepared and filed by the creditors of the defendant. The petition stated the opinions of the creditors that there was danger of property being lost, destroyed, or otherwise disposed of. The court, in considering the admission of this written instrument in evidence, stated, page 635:

> "An allegation so made by creditors of one of the accused was not admissible as evidence against the accused to prove actual or intended improper conduct of the accused or either of them. The ruling in question was erroneous. The admission of that evidence was not kept from being prejudicial by the admission of competent and uncontroverted evidence requiring the conclusion that the accused had been or were engaged in hiding assets or fraudulently dis-

posing of them * * *" The court concluded, that "because of the above mentioned error, the judgment is reversed * * *"

In *Hart v. United States,* (C. C. A. 2) 240 Fed 911, a mail fraud case, the appellate decision is based upon a letter analogous to Exhibit 75 in the instant case; and its introduction was held to be grave error, page 917:

> "* * * the attorney for Anger Company wrote Hart a letter, in which he accused Hart of a considerable number of crimes and falsehoods, and threatened that he would lay the matter before the prosecutor of New York County * * *. On this trial, this attorney testified as to his talk with Hart, and the letter aforesaid was admitted in evidence against Hart, as 'a statement made to him.' The reason is a novelty, and the action amounted to permitting a reputable member of the bar, a man of vigorous personality, substantially to make a speech, stating his very low opinion of one or more of the defendants. There is no pretense that what was said in the letter could have been repeated *viva voce* by the witness to the jury; yet such was its practical effect when read to the jury, the writer sitting by in the witness chair. This was grave error."

The situation in that case was parallel to what is presented here.

From the foregoing, it is apparent that the error of the trial court in admitting Exhibit 75 was such error as justified reversal. But it was more; it was "plain error," and required reversal; and it required consideration to that end.

In a similar situation in relation to objectionable oral evidence, going again to the ground of the charge, this

Court held that evidence admitted without limitation, the admission of which is determined to be prejudicially erroneous, cannot be considered as admissible even for a limited purpose, where the risk of confusion is so great as to upset the balance of advantage. In *Shepard v. United States,* 290 U. S. 96, 78 L. ed. 196, this Court, speaking through Mr. Justice Cardoza, states at page 104 of the reported case: "Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psycho-analysts, that our rules of evidence are framed. They have their source very often in consideration of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."

The Exhibit in the instant case declared in direct terms:

> "The allegations and persuasions made by Mr. Pierce Lonergan were obviously fraudulently made * * * You are further advised that Mr. A. M. Atwood was defrauded by the representations of Mr. Pierce Lonergan * * * he will seek legal redress, if necessary, to recover his damages sustained by reason of such fraudulent misrepresentations" [R. 533-534].

Particularly under the circumstances in which this Exhibit was presented to the jury, may it be said: "The reverberating clang of those accusatory words would drown all weaker sounds." An even more serious situation is indicated in the record.

The illegal purpose, gravely prejudicial to the defendant, for which this Exhibit was to be used, was apparent to the trial court and Government counsel, it would seem. When the Exhibit was first offered, to the objections interposed by the defendant the court added: "The additional one that it is a self-serving statement of an interested party, after the event, directed to the other person" [R. 264]. The court inspected the document [R. 263], and knew the grave charges of fraud and misrepresentation it contained. That the court knew and probably intended to indicate that the contents of the Exhibit would invade the province of the jury seems apparent from his statement to Government counsel that the Exhibit was "self-serving." After this ruling of the court, there followed the identification and admission in evidence of Exhibits 76-A and 76-B, then, "without further proof by way of identification," Government counsel re-offered the Exhibit. Defense counsel renewed previous objections, including the court's own previous objection, that the Exhibit was self-serving and the statement of third parties. To defense counsel's objection the court merely replied that the Exhibit 75 was responded to by one of the two Exhibits just admitted, without undertaking to indicate which [R. 267]. The whole matter was left at large, for the consideration and speculation of the jury. There was, in fact, no direct reference between the letters, and one of them, by its terms (Exhibit 76-B), could not refer to No. 75. Errors of this nature are those of substantive law. They are fatal because they permit the determinations of the ultimate issues and facts, (upon which the defendant is being tried), to be made and directly stated by someone other than the jury. Therein inheres the fatal nature of

the error. Therein lies the necessity of reversal on such account. And thereby results the compulsion upon an appellate court to notice the error, and give effect thereto.

Actions of the trial court which are clearly erroneous are presumptively prejudicial. They are, therefore, "plain error," and can be disregarded on appellate proceedings only when the entire record affirmatively establishes that they were not, in fact, prejudicial. *Fillippon v. Albion Vein Slate Co.,* 250 U. S. 76, 82, 63 L. ed. 853, 856; *United States v. River Rouge Imp. Co.,* 269 U. S. 411, 421, 70 L. ed. 339, 346; *Williams v. Great Southern Lumber Co.,* 277 U. S. 19, 25, 26, 72 L. ed. 761, 767. Although the first two of the above cases involved instructions, it is submitted that the underlying principle applies to other action taken by the court in the course of a trial, and particularly to matters of the admission of what is to go to the jury as evidence upon the issues submitted to them. If this is so in civil cases, it applies with greater force in criminal cases where life, liberty and reputation are at stake. *Crawford v. United States,* 212 U. S. 183, 194, 53 L. ed. 465, 470. That they are such "plain error," and therefore presumptively prejudicial and fatal to a defendant's rights, requires their notice and review by an appellate court, even though the errors involved may not have been saved and assigned in accordance with existing rules of court. *Brasfield v. United States,* 272 U. S. 448, 450, 71 L. ed. 345, 346; *Wiborg v. United States,* 163 U. S. 632, 657, 41 L. ed. 289, 298; *Clyatt v. United States,* 197 U. S. 207, 220, 49 L. ed. 726, 731; *Weems v. United States,* 217 U. S. 349, 362, 54 L. ed. 793, 796. It is submitted that the ruling of the Circuit Court is in conflict with the principles of all of the foregoing. And it is fur-

ther submitted that it is likewise in conflict with a parallel case in this same circuit, *Paddock v. United States,* 79 Fed. (2d) 872, 873-874, and with the cases of *United States v. White,* 77 Fed. (2d) 757, 758, and *United States v. Eide,* 88 Fed. (2d) 682, and cases cited.

The issue of fraud and fraudulent misrepresentations was sharply at issue in this case. The record discloses defendant took the stand and emphatically denied any intention to defraud or misrepresent or the doing of any of the fraudulent acts charged, and particularly, any operation or control of the four firms mentioned in the indictment [R. 386-446]. His good faith and sincerity were attested on the trial by leading Seattle bankers and officials [R. 332-341]. The Government's own witnesses testified to the defendant's sincerity and good purpose. [R. 142, 247]. To determine that the denunciatory charges in Exhibit 75 did not prejudicially affect the jury, it is submitted, is not possible from the record.

Still further extending and intensifying this situation was the error of the Circuit Court in refusing to consider the Assignments Nos. XXI [R. 573], XXXI [R. 581], and XXXII [R. 581], based on the hearsay evidence of McFaddin, McGrew and Romer, since thereby, the case in its entire aspect was, in effect, so conducted as to cause the harmful consequences of improper and incompetent evidence to permeate the whole record, and render the verdict wholly erroneous; and the decision in such regard is probably in conflict with the decision of this Court in *Waldron v. Waldron,* 156 U. S. 381, 384, 39 L. ed. 458, 459, and related cases.

B. The Admission of Exhibit 75 Violated Constitutional Rights

In view of the foregoing, it is submitted that it is apparent that the petitioner was deprived of the rights guaranteed, as against the federal government, by the Fifth and Sixth Amendments to the Constitution of the United States, to a fair and impartial trial, conducted according to the procedure established to govern the course of a criminal trial, and in particular the character of what shall be allowed by the trial court to go before the jury as evidence upon which they may ultimately determine the guilt or innocence of the accused upon the crime charged. The matter incorporated in Exhibit 75 was not evidence at all which had or could have, any proper place or function before the jury. It was in form and in fact a predetermined declaration, emanating from a third person, unsworn, foreclosing the very issues which the jury itself,—and no one else in a constitutional trial,—had been impanelled and sworn to hear, try, and determine. To admit it, and particularly in this case, in view of its great length as indicated by the record, and the state of the evidence as has just above been indicated, was to ignore all proper procedure, and insure the outcome of the case against the defendant. This trial was never fairly and impartially conducted, in this respect, according to any established procedure, probably conflicting with the decisions of this Court in *Shepard v. United States,* 290 U. S. 96, 103, 78 L. ed. 196, 201; *Brasfield v. United States,* 272 U. S. 448, 450, 71 L. ed. 345, 346; *New York Central Railroad Co. v. Johnson,* 279, U. S. 310, 318-319, 73 L. ed. 706, 710-711.

Second Specification of Error.

The Circuit Court erroneously applied its own former Rule 11.

The court refused consideration of a number of assigned errors, on the ground of non-conformity to its former Rule 11, in particular Nos. IX-XVIII, inclusive. That Rule was as follows:

> "The appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors * * * When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected * * * errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

Among those above mentioned were Nos. XVI, XVII and XVIII, hereinabove discussed, copies of which appear as a Supplement hereto. [Assignment XVI, Supp. p. 30; Assignment XVII, Supp. p. 31; Assignment XVIII, Supp. p. 32.] Their form is therefore before the Court. The form of the others, namely, IX-XV, inclusive, and also XVI, was the same in each instance. It is submitted that, in each instance, these assignments are in substantial compliance with the requirement of the above quoted rule, and further, that they are in complete accord with the record actually made. These assignments challenged the admission, upon the grounds of lack of foundation and hearsay, of the several mailed documents which were the basis of the several counts upon which the petitioner was tried. In view of the state of the evidence which has already been indicated, it is submitted that it was error to refuse con-

sideration thereof on the ground of Rule 11. It is submitted that in so holding, the court brought itself in conflict with its own previous decision in *Meehan v. United States,* 70 Fed. (2d) 857, and that the decisions cited to support the action taken in the instant case, *Cody v. United States,* 73 Fed. (2d) 180, 184, and *Goldstein v. United States,* 73 Fed. (2d) 804, 806, themselves rest, and expressly declare that they rest, on *Meehan v. United States, supra.*

Petitioner has been charged and convicted on a felony. At all times on his trial, he enjoyed his constitutional right to the presumption of innocence. The burden was upon the Government which had charged him, to establish his guilt as laid, beyond a reasonable doubt. The length of the trial, and the state of the evidence resulting, has heretofore been noted. In refusing to consider the errors now in question, all most vital to the petitioner, the court only says:

> "We have examined it all and find that it amply warranted submission of the case to the jury" (page 594).

In a case involving a similar question, *United States v. Spaulding,* 273 U. S. 498, 499, 79 L. ed. 617, 622-623, a like declaration by the Circuit Court, page 657, did not serve to prevent this Court from subsequently reversing that case and holding: "* * * the evidence and all inferences that justifiably may be drawn from it do not constitute a sufficient basis for a verdict for respondent." That the Government was the petitioner there is, of

course, of no moment in respect to the principle and the practice.

For the foregoing reasons, it is earnestly and respectfully urged that the petition for writ of certiorari in this case be granted and the judgment of the Circuit Court of Appeals for the Ninth Circuit and the United States District Court for the Western District of Washington, Northern Division, be reversed.

Respectfully submitted,

PIERCE LONERGAN,
Petitioner in Pro Per.

Donald A. McDonald,
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Oscar L. Willett,
Horace W. Danforth,
317 W. M. Garland Building, Los Angeles, California.
Of Counsel.

SUPPLEMENT.

Exhibits 75, 76-A and 76-B.

EXHIBIT No. 75

"August 17, 1934

Mr. Pierce Lonergan,
211 American Bank Building,
Seattle, Washington.

Dear Sir:

We are attorneys for Mr. A. M. Atwood who for approximately the last year and a half had been buying and selling silver on the Seattle Metal Exchange, through Louis Martin Company, silver brokers.

During the middle of July last. Mr. Atwood had on hand silver futures, as follows:

1,000 ounces September
2,000 ounces September
2,000 ounces March, 1935.

with a total credit margin of $324.93, in cash.

By reason of an alleged dumping of several hundred thousand ounces of silver on the Seattle market at approximately that time, the market was driven down each day to the maximum permitted under the law, with the result that on July 28th, Louis Martin Co., advised Mr. Atwood that an extra margin requirement was necessary to maintain his silver options and that it must be put up not later than Monday, July 30th, and failing to do so, would necessitate the selling of his silver options at the market.

After conferences with Mr. Pierce Lonergan and Mr. J. P. Walsh, Mr. Atwood deposited $400.00 in the Trust Department of the First National Bank, as an extra margin, conditioned upon the performance of your contract and by the delivery by you of 3,000 ounces of September option silver bullion .999 fine and 2,000 ounces of March option silver bullion .999 fine.

Mr. Atwood thus had covered the required margins. On Monday, August 6th, Mr. Atwood had a conference with Mr. Pierce Lonergan, wherein Mr. Lonergan informed Mr. Atwood that the Seattle Metal Exchange was broke; that Louis Martin Co. was broke and that there was an impending law suit involving about $150,000, which suit would tie up all the funds in Louis Martin Co. and the Seattle Metal Exchange and that Mr. Atwood had better hurry and get his $400 deposit back before these litigants tied it up and attached it, Mr. Lonergan at that time informing Mr. Atwood that the attorneys for such litigants were in conference, and that the suit would be started immediately. Accordingly, Mr. Atwood attempted to reach Mr. Walsh in order to secure a release of his deposit at the First National Bank and was unable to do so on that day.

On August 9th, however, Mr. Atwood reached Mr. Walsh, who made arrangements for Mr. Atwood to take back his $400.00 deposit in the First National Bank. Mr. Atwood took Mr. Walsh's letter authorizing the withdrawal of the $400.00 deposit and obtained such deposit.

Within an hour after Mr. Atwood had withdrawn his deposit and sold his silver options at Mr. Lonergan's and

Mr. Walsh's pleadings, the President proclaimed the nationalization of silver, at 50.01.

The allegations and persuasions made by Mr. Pierce Lonergan and Mr. J. P. Walsh to Mr. Atwood were obviously fraudulently made and were made solely with the intent to get Mr. Atwood out of the market in order to buy his silver at a low price in order that the same might be sold upon the nationalization of silver, which latter event Mr. Pierce Lonergan had been expecting for some time.

Reference is here made to Rem. Rev. Stat. of the State of Washington No. 2477, and as attorneys for Mr. A. M. Atwood, and pursuant to said statute, we herewith demand that the Seattle Metal Exchange and Louis Martin Company, or either, or both, furnish Mr. Atwood a written statement containing the names of the persons to whom his silver options were sold, the time when, the place where, the amount of, and the price at which the same was sold. You may comply with this demand by furnishing the same within 48 hours to the writer, at this office.

You are further advised that Mr. A. M. Atwood was defrauded by the misrepresentations of Mr. Pierce Lonergan and Mr. J. P. Walsh and that he will seek legal redress, if necessary, to recover his damages sustained by him by reason of such fraudulent misrepresentations.

Yours very truly,

BATTLE, HULBERT, HELSELL & BETTENS
By Joseph Gandy"

JEG:AC

EXHIBIT No. 76-A

"LOUIS MARTIN COMPANY
Bullion Brokers
American Bank Building
Seattle, Washington

Eliot
3055
Cable
Address
"Lomar"
Seattle

August 20, 1934

Battle, Hulbert & Helsell
10th Floor Exchange Building
Seattle, Washington
Attention: Mr. Joseph E. Gandy

Gentlemen:

Following is the information requested by you regarding the transactions for the account of Mr. A. M. Atwood on August 9, 1934.

OPTION	PRICE	AMOUNT	SOLD TO
6 Sept.	44c	$1320.00	Jordan Co.
4 March	44c	880.00	Jordan Co.

These transactions took place at Seattle, Washington. Any further information you may wish, please advise us.

Yours truly,

LOUIS MARTIN Co.
J. R. Walsh - (M.L.H.)"

JRW:MLH

EXHIBIT No. 76-B

"LOUIS MARTIN COMPANY
Bullion Brokers
American Bank Building
Seattle, Washington

Eliot
3055
Cable
Address
"Lomar"
Seattle

August 21, 1934

Mr. A. M. Atwood
c/o John Davis Co.
Seattle, Washington

Dear Sir:

Your communication of the 19th day of August, making certain statements through your attorneys regarding the manner in which your Silver contract account with Louis Martin Co. had been handled, has been received.

This is to advise you that upon your depositing with us the sum of two thousand two hundred and thirty-eight dollars & seventy-five cents ($2,238.75) representing ninety per cent (90%) of the contract price of the Silver contracted by you, your account will be reinstated for the amount of Silver and at the price contracted by you, provided, however, that you comply with the terms, conditions and provisions upon which you originally contracted the Silver and particularly the terms of your contract as evidenced by your signature card.

The deposit of $2,238.75 with us must be made by you on or before noon, Thursday, August 23, 1934.

Sincerely yours,
LOUIS MARTIN CO.
By J. R. Walsh (M.L.H.)"

ASSIGNMENT OF ERROR XVI

"The Court erred in admitting in evidence, and denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 75, being a letter on the letterhead of Battle, Hulbert, Helsell & Bettens, as follows:"

(Exhibit No. 75 is here set out in *totidem verbis* as it appears at Page 25 of this Supplement.)

"The testimony in support of its admission given by witnesses, A. M. Atwood and Joseph Gandy, is substantially as follows:

A. M. Atwood testified that this is a letter from my attorney, Joseph Gandy, addressed to Pierce Lonergan. I saw it before it had been sent out of Mr. Gandy's office. It is a copy.

The witness, Joseph Gandy, testified,—that is a copy of a letter I wrote under date of August 17, addressed to Pierce Lonergan referring to the relationship and dealings between Mr. A. M. Atwood and the Louis Martin Company and the Seattle Metal Exchange. I was Mr. Atwood's attorney. I transmitted this to Pierce Lonergan and a copy to the Louis Martin Company under registered mail return receipts. I have the return receipts. Witness refers to the return receipt of Pierce Lonergan letter and the one for the Louis Martin Company letter.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. It was hearsay evidence, contained conclusions of third parties, and happened subsequent to the termination of the alleged plan.

2. It was a self serving statement of a third party making the statements therein contained.

3. It was incompetent, irrelevant and immaterial, and in its nature highly prejudicial to the defendant. Its admission was not necessary to clarify 76-A, and it was not related to 76-B."

Record Page 566.

ASSIGNMENT OF ERROR XVII

"The Court erred in admitting in evidence, and denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 76-A, as follows:"

(Exhibit 76-A, is set out in *totidem verbis* as it appears at Page 28 of this Supplement.)

"The testimony in support of its admission given by the witness, Joseph Gandy, was in full substantially as follows:

This is the response that I received from the Louis Martin Company in reply to my letter of August 17, 1934. It was received through the United States mail by myself personally, and by my stenographer who handed it to me.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. It was not a part of the *res gestae* in this case.

2. It referred to a past transaction, and had no connection with the defendant, Lonergan. It was third party record."

Record Page 568.

ASSIGNMENT OF ERROR XVIII

"The Court erred in admitting in evidence, and denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 76-B, as follows:"

(Exhibit 76-B, is set out in *totidem verbis* as it appears at Page 29, of this Supplement.)

"The testimony in support of its admission given by the witnesses, A. M. Atwood and Joseph Gandy, was in full substantially as follows:

A. M. Atwood testified, this is a letter dated August 21st from Louis Martin Company, signed by John R. Walsh, and addressed to me, in care of John Davis & Company, Seattle. The letter came to me personally. I received it through the mails. It is a reply to a letter from me of August 19, 1934.

Joseph Gandy testified, the letter of August 17, 1934, was the only letter addressed at any time to Mr. Lonergan or Louis Martin Company.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. It was not a part of the *res gestae* in this case.

2. It referred to a past transaction, and had no connection with the defendant, Lonergan. It was a third party record.

3. It was not in response to any letter admitted in evidence, and particularly not in response to Exhibit No. 75."

Record Page 570.

FILE COPY

Office Supreme Court, U. S.
DEC 28 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 121

PIERCE LONERGAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

PIERCE LONERGAN,
Pro Se.

HORACE W. DANFORTH,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 121

PIERCE LONERGAN,

vs. *Petitioner,*

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

Introductory.

This brief is submitted to supplement the one already filed in support of defendants petition, and to facilitate consideration of the matters and things therein brought forward.

Hereinafter, that brief will be referred to as Br.; the opinion of the Circuit Court of Appeals (R. 449-457) as Op.; and the printed Transcript of the Record as R. The petitioner and appellant will be designated as defendant.

For convenience, the following data, with references to the printed Transcript, is supplied. The appeal herein was filed May 23, 1936 (R. 21), and submitted after argument February 1, 1937 (R. 448). The Circuit Courts' decision was rendered and filed March 5, 1937 (R. 448), and rehearing was denied May 10, 1937 (R. 457).

A statement of jurisdiction, and the ultimate pertinent facts were set forth in the petition and brief (Br. 3-6; 10); the opinion of the Circuit Court of Appeals (R. 449-457); the specifications of error (Br. 14, 22); these are incorporated herein by reference.

It has appeared (Br. 6), that the matters now presented for review by this Court arise out of the refusal of the Circuit Court to consider and pass upon certain assignments of error. It is contended that the errors thus refused consideration include both "Plain" and substantial error in the conduct of the trial which was so vitally prejudicial to the defendant, particularly in their cumulative effect, as to have resulted in denying him a fair trial, and, in respect to same at least, in depriving him of his right to due process of law. These were made the principal bases of the application for the writ (Br. 14-24). As to other included errors, it is further contended that certain of these show upon the whole aspect of the case, that the trial was so conducted as to permit such errors to permeate the entire proceedings, and to so prejudice, mislead and confuse the jury as, necessarily to eventuate in a wrongful conviction. These were previously considered (Br. 20).

Of the twenty-eight assignments thus refused consideration by the Circuit Court, this Courts' consideration is now particularly directed to the groups about to be stated. It is conceived that reasonable space, and the character of the present proceeding, do not admit of more. The grouped assignments are these:

Group 1: Assignments of Error No. XVI, together with Nos. XVII and XVIII.

Group 2: Assignments Nos. IX to XV, both inclusive.

Group 3: Assignments Nos. XXI, XXXI and XXXII.

For convenience, a table of references to the present printed Transcript, where the form and bases of these several assignments may be found, has been prepared, as follows:

No. IX: Assignment 400, Exhibit 376, Testimony 137-138;

No. X: Assignment 402, Exhibit 377, Testimony 181-182;

No. XI: Assignment 403, Exhibit 377, Testimony 138-139;

No. XII: Assignment 405, Exhibit 382, Testimony 88-89;

No. XIII: Assignment 407, Exhibit 382, Testimony 87, 98;

No. XIV: Assignment 408, Exhibit 381, Testimony 56, 58, 222;

No. XV: Assignment 410, Exhibit 383, Testimony 87, 88, 149;

No. XVI: Assignment 412, Exhibit 384, Testimony 184, 186, 187, 189;

No. XVII: Assignment 416, Exhibit 386, Testimony 185, 187, 188;

No. XVIII: Assignment 417, Exhibit 387, Testimony 185, 187, 188, 189.

No. XXI: Assignment 419, Testimony 128, 129;

No. XXXI: Assignment 426, Testimony 149;

No. XXXII: Assignment 426, Testimony 148.

Hereinafter, under the headings appearing, the several matters involved will be considered. In so doing, it is believed that it is essential to proceed along certain very definite and particular lines. It is conceived that the *whole* setting and background and this *case* must first be seen; that, thereafter the *precise content* of the specific charges against this defendant must become known; and that, then,

the *sum* and *substance* of the Governments evidence must be appraised by its own terms; all this, in order that the *full character* and *effect* of the errors assigned may become apparent. Such will be the order and purpose of this brief. In the argument following, any emphasis appearing will be supplied, unless otherwise expressly stated.

ARGUMENT.

The Outline of This Case.

In the first place, it is submitted that it is essential to consider the complete picture of what is here involved, in order that every detail may appear in its true perspective, without distortion or over-emphasis in any part.

In doing this, it is necessary to recognize that the enterprise with which this case is concerned had its first *inception* in the spring of the year 1931, whereas its *end* did not come to until the summer of *1934,* and until *after* the nation's legislation, bearing directly upon the subject matter of the enterprise, had been so radically changed as to preclude dealings such as that enterprise had contemplated and comprehended. In the losses which attended the end thus brought about, this case had its genesis. But in no sense did the enterprise *originate* its activities in 1933; and no difficulties whatever were experienced *until after* the passage on June 19, 1934, of the Congressional Act authorizing, *inter alia,* the nationalization of silver, which *latter* status of the metal was ultimately proclaimed by the President on *August 9, 1934* (R. 356-357; Instructions XXXV and XXXVI).

In the next place, it is necessary to remember that the establishment of a silver market in Seattle was an enterprise which it was conceded by all concerned was *wholly feasible,* possessed natural advantages of location, particularly in its relation to the Orient which was always a large purchaser of

silver, and at the same time had existing precedents for its guidance.

It is further necessary to remember that the defendant was the *pioneer* in the movement; that he was the *first* who perceived its possibilities, and, for a long time, was the *only* one in that section of the country who had taken occasion to advise himself at all on the subject matter, and the mechanics of its operation; and that, for these reasons he was, necessarily, at all times the *source* of information looked to by those who, ultimately, took up the enterprise: This, however, does *not* indicate that he was in *control* of the business of the different individuals or concerns who did so engage; or responsible for what they said or did. He interested them to engage, and informed them of the general objective and methods, and quite naturally became the head of the Exchange itself, as an institution; which, however, had its own by-laws and board of governors. But he did *not*, thereby or at all, undertake to dictate or control the business of those who became *members* of that Exchange, and dealt together thereon.

Upon the whole, and in truth and in fact, this defendant's situation is wholly due to the existence of *two* factors: his prominent and pioneering *position* in relation to the plan of establishing a silver market in Seattle; and the *Silver Purchase* Act of 1934, under authority of a provision of which silver was nationalized, and ceased to be a lawful basis for any market transactions, either for present or future delivery. His was the figure that prominently appeared, when the dislocation due to the Congressional enactment came; and upon his shoulders the individuals who had lost anything were easily led to cast the blame. Defendant submits that the evidence and the exhibits in this record affirmatively establish the error of any such charges as were brought against him.

Waiving any considerations of duplicity, of election, or the like, for the purpose of this statement, the indictment in this case certainly charged no less than that the defendant, *operating under four several fictitious names,* devised a scheme to defraud divers persons by means of sundry specified representations alleged to have been false, and in the furtherance thereof used the United States mails (R. 450). The indictment was originally in ten counts, but the trial court dismissed Nos. VII, IX and X (R. 344). The Government's attorney stated that; "Each Count * * * charges the *same* artifice and device to defraud, the only difference being * * * different letters * * * at different times" (R. 33). It is submitted that the indictment is *not* framed, and the trial was not conducted, upon any theory that a conspiracy had been formed to do the alleged acts. And, by the opening statement of the Government's attorney, *no joint action* was relied upon. Such attorney stated, that the defendant was the one with whom "We are *only* concerned" (R. 29). He further stated, that the Government would prove that the four companies, Gill and Company, Jordan and Company, Lonergan and Company and the Louis Martin Company, "were formed under the *authority and direction* of this defendant Pierce Lonergan" (R. 34), and that such companies were those "that were *operated* and that were *controlled* by this defendant Pierce Lonergan" (R. 35). Also he said, that "the Government's case will go to the proof that Mr. Lonergan, this defendant, was the man who *controlled* these four companies, was *the man who made these representations through these various salesmen through these hirelings, through these underlings of his*" (R. 36); and that under his *authorization,* these salesmen represented various things, "upon the *authorization* of this man standing behind *this thing* as a principal," and "acting under the *orders* and *authorization* of this defendant Pierce Loner-

gan" (R. 37). It is, therefore, submitted that the entire ultimate foundation of the Government's case rests *solely* upon the establishment of the charge that this *defendant*, in truth and in fact, actually operated under the *four several names* alleged; and in such sense that they, and each of them, were only other aspects and appearances of him himself, as his *alter ego*.

If this fundamental fact is *not* established by the evidence, then anything said or done by those operating under any of the firms not the defendant's own is, as to him, *res inter alios acta*, and he cannot be bound thereby; and to allow him to suffer therefrom is the most grievous error.

This is a criminal case. Upon its outcome depends the liberty and good name of this defendant. Hence, upon all issues raised by the allegations appearing in the indictment, the government must sustain the burden of proof. And that burden, in a criminal case, as the trial court instructed (R. 344, 345 *inter alios*), is that of establishing all such issues *beyond a reasonable doubt;* not merely to offer *some* evidence which, if believed, might seem reasonably to sustain such issues and charges, as in a civil case. Every other reasonable inference than that of guilt must be *excluded*. Whether the evidence appearing is adequate to justify such conclusion and belief is, it is submitted, now necessary to determine. It is submitted further that, in this case, the various essential charges and issues are *not* so established; and, in particular, that the fundamental charge above mentioned, to-wit, the identity of the defendant with *all* the several firms named in the indictment, is not sustained at all. And it is still further submitted, that, on the contrary, it appears, by the government's own witnesses, that the proof of any such charge beyond any reasonable doubt is *impossible*. With this in mind, consideration will next be given to an analysis of the proof which the

Government adduced, such consideration being directed to the purpose of establishing that the state of the record was such that any of the errors complained of, much less all of them together, would necessarily be vitally prejudicial to this defendant.

The Government's Evidence.

It is submitted that the Government did not establish the indictment as laid; and particularly did not establish that the defendant "engaged in the alleged silver brokerage business at Seattle, Washington, under the firm names of Pierce Lonergan and Company, Louis Martin and Company, Gill and Company, and P. A. Jordan and Company, and operating the so-called Seattle Silver Market under the name of the Seattle Metal Exchange."

It will first be desirable to refer again to the scope and limits of the charges upon which the defendant was tried, as a basis for considering the sufficiency of what was shown. Manifestly, the indictment was not framed upon the theory of any *conspiracy.* In his opening statement as already noted the government's attorney relied upon *no* claim of *joint action,* but said: "We are *only* concerned with the defendant Pierce Lonergan" (R. 29); and this was confirmed by the court's instructions to the jury, that Walsh's "plea raises *no presumption* as to the guilt or innocence of the *defendant* on trial" (R. 344), that "you are concerned *only* with—the defendant Lonergan" (R. 344), and that "the defendant on trial and another man, and *each* of them, devised a scheme and artifice to defraud" (R. 345). In view of this, it must follow that the trial was had upon the theory that this defendant *alone* was liable for all that was charged and shown, with its necessary corollary that *any and all* acts and statements introduced in evidence would be *connected* with him as their sole responsible cause. With reference to the character of the fraudulent "scheme

and artifice'' sought to be charged against this defendant, the Circuit Court has held in its opinion (R. 454); ''The indictment does not charge any scheme to steal money *nor* any scheme to *rig the market.* It charges 'a scheme and artifice to *defraud and for obtaining money* and property by false and fraudulent *pretenses representations and promises.*' '' By coupling a charge ''to defraud'' with one ''for obtaining,'' etc., the indictment made *intent* an essential ingredient in the proof of the offense charged. And the trial court so instructed (R. 348, 349; Instruction XLV, R. 360).

Defendant regrets that the Circuit Court, in upholding against assignment of error No. 6 the trial court's denial of his motion for a directed verdict, deemed it advisable to say: ''A detailed statement of the evidence would serve no useful purposes'' (R. 454). It would be very helpful at this time to know exactly the general lines and items of the evidence which impressed the court and influenced it in its decision, so that they might be dealt with and discussed directly and at once. Furthermore, such statement might otherwise prove of service to the defendant. (*Shores* v. *United States,* 80 F. (2d) 942, 948: Memorandum by Denman, Circuit Judge.)

It would be much appreciated, if the opportunity presented itself, to discuss in detail the numerous representations and promises which the indictment charges were falsely and fraudulently made by this defendant, and to assess them separately and successively in the light of all the evidence that was adduced. It is confidently contended that such an investigation would disclose fallacies and inadequacies now unsuspected, and inevitably lead to a different outcome. Such detailed discussion is, of course, impossible within the limits allowed here for such an argument. All that can be done is to point to the most outstanding insufficiencies of evidence, and earnestly invite this

Court to pursue the investigation to its conclusion, as is customary and requisite on such occasions (*McWhorter* v. *United States,* 299 F. 780, 781; *Bishop* v. *United States,* 16 F. (2d) 410, 412 (2).

At the outset, attention is called to the fact that the defendant put his character in issue, and established his previous reputation and good standing. Judges, lawyers, doctors, bankers and business men were called and their testimony was unvarying. Defendant's previous reputation, over many years, had been good. This the government did not undertake to controvert. And cross-examination went only to knowledge of the dealings of the particular witness in respect to the Seattle Metal Exchange. This fact of good standing should have bearing and weight in dealing with a defendant's own evidence in a case, and in arriving at a final determination as to guilt or innocence. (*Spalitto* v. *United States,* 39 F. (2d) 782, 784.) And, it is submitted, it is right that it should be so. A man's previous standing and good fame *should* be permitted to come to his aid and be deemed to support and sustain him, when, as here, he sincerely avers that he was the father of no "scheme or artifice" to defraud anyone of anything, or to obtain from them their money or property without value received. Without more, the court is respectfully urged to consider the following testimony of Beeler (R. 260), Rogers (R. 268), Moriarty (R. 268), Sullivan (R. 269), Jones (R. 270), Douglas (R. 271), Marshall (R. 272), Hacker (R. 272), Lundin (R. 273), Nicholson (R. 273) and Molyneux (R. 274), along with the testimony of Perkins (R. 232), Preston (R. 234), Arnold (R. 235), Greenwood (R. 238), Akerlund (R. 239), Eckstein (R. 241), Stole (R. 243), Lamping (R. 245) and Ballantine (R. 247).

It is said in the Opinion herein (R. 454),

> "The scheme described in the indictment was proved, substantially as alleged. There was substantial evi-

dence that appellant *devised the scheme* and, for the purpose of executing it, *mailed* the letters set forth in the indictment, or *caused them to be mailed.*"

By reference to the indictment, it appears that the basis of the scheme, and its method of operation to accomplish the alleged fraudulent purpose and intent, is set forth with much detailed particularity. In such a case, in *reversing* a judgment of conviction, it has been said:

> "(7) It is not necessary to prove all the false representations alleged in an indictment based on Section 215, *supra,* but it *is necessary* to prove those essential to lay a *sufficient foundation* for a finding by a jury that a scheme in substance was devised."
>
> *Rude* v. *United States,* 74 F. (2d) 673, at 677. (Citing cases.)

And, in an analogous case, the Ninth Circuit Court held

> • • • "Upon the charge it became necessary to prove that the whisky was imported from Canada. Mr. Justice Brewer, for the court, in Potter *v.* United States, 155 U. S. 438, 15 S. Ct. 144, 146, 39 L. Ed. 214, said: 'It is generally true, as claimed, that, where an indictment is unnecessarily descriptive, even the unnecessary description must be proved as laid.' In the instant case, if the country from which the whisky was imported had not been given in the indictment, it might have been required by bill of particulars, but being given the proof became necessary."
>
> *Kennedy* v. *United States,* 44 F. (2d) 131, at 132.

And further in the same case, at the same page:

> • • • "Circumstantial evidence, of itself, is sufficient to convict if the *circumstances are consistent* with each other, *consistent* with *the guilt* of the party charged, *inconsistent with his innocence* and *inconsistent* with every other *reasonable hypothesis* except that of guilt."

It is submitted that there are many major "circumstances" in the instant case which cannot be made to square

with any hypothesis of guilt as charged on the part of this defendant. Attention will be called to certain of these, as the present argument proceeds. Under such conditions, it has been said:

> "but, when all is said and done, the rule quoted in Bishop *v.* United States (C. C. A.) 16 F. (2d) 410, is still the law, that, where circumstances are relied upon, they should be such as to *exclude any reasonable hypothesis of innocence.* From the printed page there is serious question whether the government proved any criminal plan. If the plan shaded from an honest to a dishonest one, the time it crossed the line is not shown by the record."
>
> *Beck* v. *United States,* 33 F. (2d) at 112.

And furthermore:

> "There must be substantial evidence of *guilt beyond a reasonable doubt.*"
>
> *Spalitto* v. *United States,* 39 F. (2d) 782, at 784, citing cases.

Regarding a number of the specified "representations and promises," which the indictment alleged were false, but little can be said herein by reason of space. The record does *not* establish that any representations that the defendant and the others concerned in the various firms named were "responsible, worthy and qualified," were, in fact, ever made. But, in any event, the evidence does not show that such representations, if they had been made, would have been false. And the defendant was affirmatively shown to have ample coverage for any commitments he might make (R. 219, 220, 236, 243, 245, 305-306). Neither does the record establish that the defendant ever stated that the Seattle Market was "connected" with other markets in any such sense as the indictment appears to infer; or that such other markets would "support" the Seattle Market in

any other sense than if the price declined there more than elsewhere, others would buy there for the sake of the benefit to them in price. Wherein the Seattle Silver Market was "*not responsible,*" whatever that may mean, was not shown. It does appear, however, that it functioned, without difficulty, until the passage of the Act of 1934 with its authorization of the nationalization of silver. And it also appears that its end came along with that of the New York market which, however, the government had supported by purchases therein (R. 339). It was shown to be true that the price of silver would rise (R. 74). It did rise, and was rising, prior to the enactment of the legislation above mentioned, as a result of which it could no longer be dealt in, and its price became immaterial. It is not made to appear that the possibility of trading in Seattle for smaller amounts than was possible in New York lured small and inexperienced investors into trading. On the whole, the governments investor witnesses testified to previous experience in market dealings, and confessed knowledge of margins and their significance. And their order cards expressed the terms of their contract fully (R. 75, *et seq.*). Other specified "representations and promises" will be referred to in what follows.

For the remainder of this consideration, *three matters* will be dealt with upon the record. First, the "scheme" *proved,* as compared with that *alleged;* second, that there was shown an *actual,* and not a "*so-called*" market; and third, that the defendant was not the four firms named, and did *not* operate or control them.

First, as to the "*scheme.*" The "scheme" charged was "to defraud *and* for obtaining," etc. This, as the trial court properly instructed (R. 345), necessitated the proof of *fraudulent intent.* All this must be proved as laid, beyond a reasonable doubt.

What ever the "scheme" was shown to be, the defendant originated it, and by his continued efforts fostered the establishment of a Silver Market in Seattle. The government relies upon this, because its attorney in his opening address said the defendant was the "man standing behind this thing as principal" (R. 37). There is, then, no dispute as to this. The present point is what *was* the "scheme" which the evidence shows. It did *not* originate in 1933, but prior thereto, and in *1931.* This the government's attorney himself states (R. 34). Since there is thus no dispute as to this point, the evidence appearing will be dealt with chronologically.

Defendant himself testified that he first became interested in silver in 1930 (R. 279). He told the story of his researches, (R. 279-281), resulting in a conclusion that the *Pacific Northwest had the natural resources of silver,* that its future depended on trade with the Orient, that other factors favorable to Oriental trade existed but there were *no adequate local facilities* for handling foreign exchange with the silver using countries of the Orient (R. 281, 282).

He formed a plan, a "scheme" let it be called, to provide those facilities. He incorporated the "Seattle Metal Exchange," and the "San Francisco Metal Exchange" in 1931, in order to hold the name (R. 283).

He then started on a campaign of education—almost a crusade. He wrote and spoke extensively on the subject. (See defendant's testimony as to Exhibit A-34; A-35; A-37-B; A-37-C; A-37-D; R. 285.) It must be borne in mind that *at that time* there was *no such thing* as silver futures trading, and so far as this record discloses no thought of any, anywhere. The New York Commodity Exchange, the only other organized silver market that ever existed in the Western hemisphere, commenced trading in silver futures on June 20, 1933 (R. 201, government witness Dutton). De-

fendant's sole idea, disclosed by what he then said and wrote, was to bring about the accumulation in the Pacific Northwest—or at least on the Pacific coast—of sufficient silver bullion to make possible the formation of an American owned foreign exchange bank to specialize in silver exchange with the Orient, and to make use in international trade of the produce of our nearby silver mines.

In the early spring of 1932, he went to Dr. Howard H. Preston, professor of money and banking at the University of Washington, with his "scheme" for using silver bullion as a medium of exchange (Preston, R. 234).

The minutes of the Mines and Mineral Committee of the Seattle Chamber of Commerce for May 7, 1931 (defendant's Ex. A-23), and June 16, 1931 (defendant's Ex. A-22), and the testimony of W. T. Perkins (R. 232), sometime president of the Seattle Mining Exchange, regent of the State university, and chairman of the sub-committee of the Mines and Minerals Committee of the Seattle Chamber, show that the defendant was working on this "scheme"—and what the "scheme" was—early in 1931. Among other things, Perkins testified on this point:

> "In addition to that Mr. Lonergan was at that meeting and made an address on the silver question and the possibility of arriving at interesting people here in the purchase of silver produced in the Northwestern mines, and exporting the same to the Orient. He was working at that time on a metal exchange to deal in the silver bullion for export purposes and he had interested the bank and others and expected to buy the silver produced in the Northwest states for export. • • • The committee had several deliberations; I talked with Mr. Lonergan on several occasions. He went into it very fully with myself and other members who were interested at that time. A great deal of silver is produced in Idaho and British Columbia; it goes from here to San Francisco for shipment. Mr. Lonergan was very

enthusiastic on the possibilities of a silver market here, and *I found no exceptions to his ideas* of establishing a silver bullion market'' (R. 233).

In 1931 or 1932, defendant went with his plan to George Greenwood, president of the Pacific National Bank of Seattle, a man with 30 years banking experience. Greenwood testified:

> ''In 1931 or 1932 he became very much interested in the matter of marketing silver, and in the problem of establishing a silver market and exchange in Seattle. We discussed from time to time the possibilities and probabilities of establishing such a market. In the course of our discussions we considered the *Department of Commerce's bulletin, ''The Silver Market''*, (defendant's Exhibit A-1). We discussed the flow of silver, its production and its consumption markets, the sources of supply in the Northwest, and the probability of getting an outlet for them through Seattle. *Our own bank investigated* through Mr. Lonergan the possibilities of handling silver, and he gave me considerable information and sources of authority on the problem, and the practicability of the location of such a market in Seattle, and in turn *I gave him considerable information regarding the operations of the banks, clearing house.* I informed him that the functions of a clearing house was to clear the obligations of the members of the association, and that balances of the members were likewise cleared every day from the association back to the members'' (R. 238-239).

And this bank stored and delivered silver on contracts (R. 243; 330) when this business started in 1933-34.

In 1931 or 1932, defendant attempted to interest Nathan Eckstein, leading citizen of Seattle, in establishing a silver market in Seattle. What defendant then did shows his ''scheme''. Eckstein testified:

> ''I have known the defendant, Mr. Lonergan for about 12 years. About three or four years ago I first

discussed with him the matter of the silver market. He wanted to get me interested in establishing a silver market in Seattle, so that a stock of silver could be on hand in Seattle, so that foreign transactions in silver currency countries could be based on that stock and that market. *In my opinion, if such market were established, it would be helpful to the trade here in Seattle,* because the Oriental countries base their currency on silver. There are enormous fluctuations in the value of silver. The buying power of Oriental countries goes up or down, and the greater the buying power of Oriental countries, the greater the possibilities of our export business, and the more favorable the silver exchange for them, the easier it is for them to buy in our market'' (R. 241-242).

Defendant discussed this matter with Lawrence Arnold, Vice-president of the First National Bank of Seattle, in charge of that bank's purchases and sales of securities. Arnold testified:

''During the years 1933 and 1934 the matter of establishing a silver market, and Oriental exchange market in Seattle, was discussed by us on six or seven occasions, as well as with other officers of our bank. In the discussions it was brought out that the establishment of the exchange would *first require the accumulation of silver bullion in Seattle.* The object would be the *ultimate engaging in exchange transactions with the Orient.* There is *no foreign exchange bank* dealing exclusively in exchange in Seattle *except* the Yokohama Specie Bank. These discussions brought out the consideration of the international and national economic conditions which were disturbing the monetary and banking system. *Because of the upset monetary and banking conditions we concluded that the local banks would not engage on their own account* on exchange transactions. It is a common practice in the City of New York and in San Francisco. I thought it was possible to obtain without any difficulty *seventy-five*

> *thousand dollars credit* to finance such an operation as the buying of silver bullion in one market for the purpose of selling it in forward delivery in another market" (R. 235-236).

Arnold did arrange for $25,000.00 backing from William Pigott (Defendant's Ex. A-21; R. 236).

Defendant made arrangements through Walter W. Stoll, secretary-treasurer of the Alaska Pacific Mines for extensive backing as required. Among other things he arranged with the Pacific Bank of San Francisco for the purchase of *250,000 ounces of silver* to be sold on the Seattle Metal Exchange. The *first sale* by the Pacific National Bank across the board of the Seattle Metal Exchange was for 100,000 ounces in *April, 1934* (R. 244). As to defendant's "scheme", Stoll testified:

> "I talked with Mr. Lonergan *many times subsequent and prior to the fall of 1933,* regarding the establishing of a silver market here in Seattle, where silver could be sold as well as bought. He believed that a very large market for silver could be established here. There is no question of his enthusiasm and his sincerity, and I believe that he was *thoroughly sound in his theory.* He requested me to find institutions and persons of means in Seattle and in the Northwest who were willing to buy bullion, or to buy futures in one of the larger established markets for the purpose of using that as a basis for sales in this market" (R. 244).

Similar backing for the "scheme" was furnished by G. L. Lamping, former manager of the Federal Branch of the Federal Reserve Bank and manager of the Seattle office of the Reconstruction Finance Corporation for three years (R. 240). As to the "scheme", Lamping testified:

> "The idea was to have me take over the credit features of borrowing against a deposit of silver bullion, and principally in local banks. The credit would be

based against silver bullion or silver. The banks were then to extend a loan against that with a certain margin of security over and above the New York quotation. The purpose was to establish *a silver market in this city* so that it would become *a market for silver all over the world,* principally Shanghai. The necessity and the desirability of having silver bullion accumulated and stored here by people who lived here was discussed'' (R. 244).

The government's witnesses testified to the same ''scheme'' and none other. Coventry, a principal witness for the prosecution, testified:

> ''I understood he was doing something toward building up a silver market here'' (R. 63-64). ''*He was absolutely right* that this was from the standpoint of time and place an excellent place for a silver market'' (R. 73).

Coles, government witness, whose customers seem to have made most of the complaints, and who, on his own testimony, made representations to purchasers that he, Coles, knew were not true, (R. 96), testified as to what defendant's ''scheme'' was as far back as *1932.* He testified:

> ''Mr. Lonergan had been *studying the silver situation,* the world silver situation, and was attempting to, I would say, educate me. He thought there was a big future in it, and I thought I could go out and sell silver bullion. There was no talk at that time about a silver futures. His thought was, and he was trying to impress upon me, was *to accumulate silver in the City of Seattle,* silver bullion'' (R. 83).

and again:

> ''At the meetings there was probably an inference that it would take three to five years to build up this market to a normal operating basis'' (R. 94-95).

and again:

> "Lonergan was *interested in building up volume* as a whole, but *not in any particular affairs* of the brokers or their agents" (R. 96).

Government witness McKnight, salesman for Coles, on this point testified:

> "Mr. Lonergan stated it would take some time before there would be *enough* silver so we could have *a real operating silver* exchange, *and probably a foreign exchange bank.* He stated it would take time to *familiarize the people,* the bankers and business men with the *foreign exchange* and *silver as a commodity.* I was under the impression there was only one exchange outside of Seattle in the whole United States. He *stated it was very essential* to this program in making Seattle an exchange that there be accumulated in the City of Seattle a large amount of silver" (R. 146-147).

Government witness Sternoff, who certainly was not friendly to defendant, testified:

> "He stated that the development of the Seattle silver Market would be the forerunner of the creation of *a foreign exchange.* I was primarily interested in working toward the future of that foreign exchange business; he told me that when I first became interested that it *would require a number of years* to build up an adequate silver supply here to create the basis for that foreign exchange business. He *repeatedly* during the period of time I was connected with the company *assured me* that the *real returns* for those who were interested in the Seattle Silver Market would come when they had achieved the position which would enable them to deal in foreign exchange transactions" (R. 165-166).

Government witness Thompson testified:

> "In the course of the discussions the advisability of establishing a *silver market* was based upon the further thought that there should be a foreign exchange or

> Oriental exchange bank established here in the Northwest, and *it sounded quite feasible.* We discussed seriously the question of whether that bank should be established in Tacoma or Seattle. Mr. Lonergan stated that we were *all working towards getting silver reserves,* in here so we could continue further operations. Mr. Lonergan thought it was feasible and practical that individual private parties could accumulate that silver in lieu of the banks' accumulating it, and I *cooperated to the extent of establishing a brokerage firm.* The idea was to break the silver down into small enough units so the average individual could acquire and store it, and in the aggregate accumulate a reserve here" (R. 174).

It is submitted that there is in the record no other evidence bearing upon the *nature and purposes* of the defendant's scheme, or upon his intent in carrying it out. In this connection, it is further submitted that the testimony of the government witness Charlotte Coventry (R. 223-226), offered at the very close of the case, bears upon its own face such manifest evidence of its absurdity and untruth, especially as it appears on page 223 of the record, as to deprive it of all credibility, and render it unworthy of attention by either jury or court. It obviously originated in an unbridled imagination, motivated solely by a strangely malignant spirit toward the defendant. It is, it is submitted, not rendered even plausible by any single circumstance in the entire case, but is, on the contrary, contradicted by all else that appears. In such situation, *"the weight of the evidence"* will be noticed. (*Williams* v. *Great Southern Lumber Co.*, 277 U. S. 19, 25-26, 72 L. Ed. 761, 767).

It is also submitted that the fact that silver "futures" began to be traded in in Seattle about June, 1933, is of no significance in respect to the "scheme" and its purposes. It is certainly not any evidence, in the light of what has already been set forth, of any *change* in that "scheme",

much less the formulation of any *new* one. Trading in silver futures began in New York about the same time (R. 201). (Government witness Dutton). Even the government witness, Coventry, testified:

> "I saw nothing personally that was not entirely aboveboard, honest, and in good faith prior to July 27, 1934" (R. 65).

But, by July 27, 1934, the *Silver Purchase Act*, also authorizing the *nationalization* of silver, had been passed. And nationalization, as a *fact*, was declared about two weeks later. In that legislation, and in that alone, lay the cause of the difficulties which beset the Seattle market, and finally caused its close, just as it closed the silver market in New York (R. 115 and R. 201). It was in *this* connection that the Exchange was kept open and the various *offers* were made on the floor of the Exchange after July 27 (R. 115, 116). *No sales* whatever were made on or after that date (R. 75, 283). Such acts, under such circumstances, certainly could *not* be designated as "manipulations" of the market resulting from a *preconceived* intent to accomplish any purpose whatsoever, except to keep the market open; and particularly could they not result from any *intent formed in 1933* or theretofore. At that time, neither the defendant nor anyone else could foresee, or even suspect, that silver would be *nationalized in 1934*. Whether it was best to keep the market open or to close it, as a matter of ultimate result, was and is a matter of opinion and judgment. It certainly could not be any basis of a criminal charge. The quality of men's acts and judgments must be weighed and determined with reference to a national occurrence creating new conditions. (*Norcott* v. *United States*, 65 F. (2d) 913, at 919 (14)). It is finally submitted that the government proved *no* fraudulent "scheme" but positively established the contrary.

Second, as to the *character* of market shown.

The indictment alleges that this was not a market in fact, or a genuine brokerage business but was an "*alleged* silver brokerage business," and a "so-called Seattle Silver Market." The Circuit Court in this case has said:

> "The indictment does not charge any scheme to steal money nor any scheme to rig the market" (R. 454).

Thus is the issue squarely presented—did the government prove this this was merely a bogus, an "alleged", "a so-called" silver market? In other words, was there evidence sufficient to send this case to the jury on the theory that appellant was really operating any equivalent of a "bucket shop"? There is no escape from this position. The indictment does *not* charge that the appellant operated a silver market, or a brokerage business, and then *fraudulently rigged* that market in order to obtain money and property of others. The government charged that this was *not* a market at all—that it was merely a counterfeit. The allegations of the indictment must be proved as laid. It is assumed to be elementary that the form, tenor, or gravamen of an indictment cannot be changed upon trial thereunder. (*Gammon* v. *United States*, 12 F. (2d) 226, 228 and cases; *Naftzger* v. *United States*, 200 F. 494, 496-497; *Ex parte Bain*, 121 U. S. 1, 9-10, 13 and cases; 30 L. Ed. 849, 852, 853). What does the record show?

Let the start be made with the opening statement of the district attorney, (R. 29-41). He stated that the Seattle Metal Market was incorporated and that:

> "the evidence will further disclose that from the inception of this company early in the spring of *1931* down to about the twentieth day of June of 1933 the Seattle Metal Exchange dealt in contracts which will be referred to hereafter as spot silver contracts. Those are contracts which provided for the immediate delivery of silver itself. The evidence will disclose that they dealt in that type of contracts from March of 1931 down to

about June the 20th of 1933. The Government will prove that on or about June the twentieth of 1933 this Seattle Metal Exchange commenced to deal in what is termed as futures, that is, contracts for the future delivery of silver. They also commenced to deal in what is known as contracts, sellers' contracts for the future delivery of silver" (R. 34).

The opening statement then relates the organization of four brokerage companies, and states that the delivery months on the market were March, June, September and December of each year; that most customers invested in silver futures contracts, and that *only four* men were allowed to trade on the floor of the Seattle Metal Exchange.

There is not one word in the opening statement that the government intended to prove that this was *not* a genuine brokerage business and a real silver market. The nearest the district attorney came to that point was to say that the evidence "will show that this Seattle Metal Exchange was *not* financially responsible" (R. 37). He related certain alleged *irregularities in operation* in specific instances, and certain alleged *misrepresentations by salesmen;* but he never claimed that this business and market was *not* set up and operated as a genuine business and market.

On the contrary, in his opening statement, he *abandoned* the theory of the indictment, and in effect actually placed the inception of defendant's alleged "scheme" to defraud as of a date *after* the passage of the silver legislation on June 19, 1934. He said in effect that defendant, *acting on a rumor of the new silver legislation,* took steps to, and did, "break that market" (R. 39). He never claimed that this was a *bogus* market; only that it was a real market that was so *manipulated* after June 19, 1934, that it was wrecked. The indictment does *not* charge a rigging of the market; but, it is submitted, that, in substance, the opening statement does.

What then is the evidence on this point? *Not one word was introduced even hinting that the appellant's business was an "alleged" but not a genuine silver brokerage business; or that this was a "so-called" as distinguished from a real silver market.*

Coventry, government witness, office manager for Louis Martin & Co., testified:

> "For every contract that was bought through a broker on the floor of this exchange, there had to be a seller, that is, another broker found someone who was willing to sell the amount of silver that the buyer wished to buy" (R. 43).
>
> "The customers did not contract on the exchange themselves—they had to deal through a broker or an associate; then the member brokers went on to that exchange and contracted among themselves" (R. 73).

A market where orders are actually placed—that is, where the buying and selling orders are actually executed must be an *actual* market.

Coles, government witness, doing business as Norman Edward Co., testified:

> "The market operated *just like any commodity exchange*, and when the buyer put up his margin, or his guarantee, that he would take delivery, and on the other side of that transaction was the seller, who likewise put up his guarantee that delivery would be made. • • • *That is what this was.* The buyer and the seller met. Transactions were made. The margins were kept in the Clearing House" (R. 84).

Goggin, government witness, and sole owner and operator of P. A. Jordan Co., testified:

> "The operations of the Seattle Metal Exchange were similar to that of *any other ordinary market* dealing either in securities or commodities. It was a designated place where members met and transacted business. One

broker had an order to purchase. He came upon the floor of the Exchange and said, 'I offer one contract', or whatever the designated amount would be, at a certain price. If there were any bids, or if some other broker had a sale at some designated price, why, he would say, 'I bid a certain figure'. And if the price is met, there was a complete transaction. If the prices were not the same, there wasn't any transaction, and the broker did one of two things, he either allowed the offer to remain, or he would call back his office and inform the office, or the floor man, or the customer's man, that he couldn't buy at that price or he couldn't sell at that price, and then give him the quotation, that is, the bid and offer. And it may be that the bid and the offer would be changed to meet the transaction, if the offer or bid was still on the floor. On the other hand, there were orders at the market, and the broker would bid a certain price, the seller would offer at a certain price, and so on the brokers would meet upon a particular price, and the transaction would be completed" (R. 101-102).

"The practice of the clearing house was similar to the practice of the clearing house of the Los Angeles Stock Exchange or the San Francisco Stock Exchange clearing house. At the time delivery date came due on contracts there would be an actual delivery made" (R. 114).

Thompson, government witness, and member of the firm of Ray Thompson Co., testified that the orders taken by his firm were executed on the floor of the Seattle Metal Exchange (R. 171).

Gill, government witness, and sole owner of Gill & Co., testified:

"Tender of silver was made on all outstanding contracts on the Exchange *during delivery months* by the brokers who had outstanding selling contracts to those who had outstanding buying contracts" (R. 199).

Dutton, government witness, secretary of the Commodity Exchange of New York, described the method of trading on the *New York* market (R. 202, 204). It was *exactly* the method followed in Seattle.

The London silver market is operated by *four* firms only, and its method is the same as was used in Seattle (R. 70-72).

The rules and regulations of the Seattle Metal Exchange were a *copy* of the rules and regulations of the New York Commodity Exchange (R. 288). The general laws of the Seattle Metal Exchange were identical with the basic laws of other commodity exchanges in this country (R. 289).

Certainly all the commodity exchanges of this country are not "pretended" and "so-called".

There isn't one word of evidence in this record to show that any of these brokers, or associates, ever took an order and carried it out himself. The record shows affirmatively that all orders received to either buy or sell were *executed on the floor of the exchange*, and there only. If a broker received orders to buy, he went on the floor of the Exchange and contracted in his own name an aggregate amount of silver to cover the buying orders he had received from customers. That is not the technique of bucket shop operators, or of anything except *a bona fide* [redacted]

Neither the size, nor the financial strength of an institution is of importance in the consideration of this point. A man legitimately may engage in a brokerage business without having a long established business, or possessing great financial strength. *Genuineness* is not to be determined by the volume of business done, or the wealth of the brokers. It is not relative to such factors.

There is not one word of evidence in this record that defendant sold anything that he had not already bought. The Government's attorney stated that "this defendant, Pierce Lonergan, *knowing he* could not cover these contracts, that he could not make delivery when these contracts came due,

* * * made large offers of silver futures contracts in his local exchange down here", but there is no evidence to make that statement good. Defendant bought in large blocks on other markets, at wholesale as it were, and sold in small lots, retail quantities, on the Seattle Metal Exchange. His testimony stands uncontradicted:

> "At no time from June, 1933, to August 9, 1934, was there any time that I was not hedged or covered at a profit on the basis of outstanding contracts I had on the exchange. I think there would be about 65,000 ounces open on the September 1933 delivery. As I went into December of 1933, there was approximately 130,000 ounces. There was a profit in the December delivery of approximately 3 cents. There was about 225,000 ounces open on the March, 1934, delivery, at about a 3 cent spread. I think I acquired this at about 42 cents, and the average daily price here was 43 cents. They moved up about 3 cents a delivery, or about 1 cent a month. The next delivery was June, 1934. There was open then, in round numbers, either 325,000 or 370,000, I would say 350,000 to fix the figure, in which I had about a 3 cent advance over what I had contracted, as I figured that was the only safe price. I was prepared and ready to make delivery of the contracts on the delivery months, and tender was made, silver was brought into Seattle for the December delivery in the amount of 125,000 ounces" (R. 305, 306).

It is submitted that the government's own evidence conclusively establishes that this was an *actual* market, operating in the ordinary and usual way, not only in 1934, when silver was nationalized, but in 1933, and prior thereto, as far back as 1931. The indictment charges as to "alleged silver brokerage business," and "so-called Seattle Silver Market," were not proved as laid, or at all.

Third, as to the *four firms*. The indictment charges the *defendant* with "being *engaged* in the alleged silver broker-

age busines at Seattle, Washington, under the *firm names* of Pierce Lonergan & Company, Louis Martin & Company, Gill & Company, and P. A. Jordan Company, and operating the so-called Seattle Silver Market under the name of the Seattle Metal Exchange."

The district attorney in his opening statement referred to the concerns as:

> "Those four companies that were operated and that were controlled by this defendant, Pierce Lonergan" (R. 35).

He also said that the evidence would prove that:

> "this defendant, was the man who *controlled these four* companies, was the man who *made these representations,* through these various salesmen, through these hirelings, through these underlings of his" (R. 36).

In other words, this case was tried on the theory that these four companies were, in effect, merely alter egos for Pierce Lonergan. Again, what was the proof?

Defendant himself testified positively that he had *no interest* whatever in any of the firms, except Pierce Lonergan & Co., and that he had *no control* over their business or operations (R. 302, 317, 318, 319, 331). As has heretofore been noted, the defendant's testimony in this case, in view of his previous unchallenged and uncontroverted good character and repute, should be considered and given weight.

W. G. Coventry, for the government, testified to the make-up of the different companies, and said:

> "The head of Louis Martin Co. was Mr. John R. Walsh" (R. 42).

He said that all money received by him (witness) in the course of business was turned over to Walsh (R. 47). He further said:

> "Yes, certainly, Lonergan had *no interest* in Martin & Co.; I believe it was a corporation" (R. 64).

It appeared that defendant had previously sold out all his interest in the corporation to Walsh (R. 287). And the transfer was established by documentary evidence (R. 287, Exhibit A-38).

N. E. Coles, government witness, testified that he was first with Louis Martin Co., but in January, 1934, started his own brokerage business as Norman Edward Co. (R. 83, 91). He testified:

> "He certainly did *not* share in or get any of the commissions of Norman Edward Company. He had *no interest* in my commissions. He never held any position with Norman Edward Company" (R. 95).

Coles further testified that defendant had had no interest in the business or customer's accounts of any of the firms:

> "He (defendant) was *interested in building* up volume as a whole, but not in any particular affairs of the brokers or their agents" (R. 96).

G. T. Goggin, for the government, testified that he was a member of the Exchange, and stated:

> "P. A. Jordan & Co. was *my* firm" (R. 101).

And he also testified:

> "I was the *actual manager and operator* of the P. A. Jordan & Company; Mr. Lonergan had *no interest* in any commissions or any profits that were made by *any* of the member brokerage companies on the Seattle Metal Exchange; especially he didn't have any with P. A. Jordan & Company. It was the purpose of P. A. Jordan & Company to act as a seller and to buy various accounts that were assigned to P. A. Jordan & Company, such as the account of the Pacific National Bank in San Francisco. Instead of having the Pacific National Bank act as the seller on the floor of the Exchange because their commitments were in large amounts of 100,0000 ounces, they were assigned to the

various so-called street accounts and broken up into small 500 ounce lots'' (R. 114).

W. R. McKnight, a government witness, testified that his employment was with Norman Edward Co., commencing in March, 1934 (R. 145). He further testified:

> ''Mr. Lonergan had *no authority* over me. Mr. Lonergan had *no salesmen* as far as I know. The sales meetings were the meetings of Norman Edward Company, Gill & Company, Martin & Company, and P. A. Jordan Company. The P. A. Jordan Company was represented by Mr. Goggin. The purpose of the meetings was to discuss the silver market, the price of silver, and inform those present as to the changes in the market, different bills that were being passed in Congress, or up for passage. We knew that many outside influences might affect the price one way or another'' (R. 145-146).

He also said:

> ''He (defendant) stated at these meetings that he was acting as a broker, and also president of the Exchange. I do *not* know of any salesmen he (defendant) ever had. To the best of my knowledge, Mr. Walsh, Mr. Goggin, Mr. Gill and Mr. Lonergan were operating independent of each other. Mr. Lonergan explained that outside markets would support the Seattle market *when prices were cheap enough here* so that purchases could be made here as well as on the outside market at a profit'' (R. 147).

L. J. Gill, a government witness, testified:

> ''I became a member broker under the name of Gill & Company; it was *purely* a firm name for an individual—myself'' (R. 195).
>
> ''Mr. Lonergan had no control whatsoever of my salesmen ——; the operation of my business was solely up to me'' (R. 258).

He also testified:

> "To my own knowledge all the members of the Seattle Metal Exchange were separate organizations and separate firms" (R. 259).

Thus out of the mouths of the government's own witnesses, and from the only parties who were in a position to have actual knowledge whereof they spoke, it indubitably appears that the *four firms* were *wholly separate*, that the defendant did not own them, and, on the contrary, had *no interest* in them and did not control their acts and doings. He did *not* stand behind them "as principal" or at all.

That all should seek the defendant's counsel and advice in the matters going forward was but natural and necessary. As pointed out at the beginning, and as since fully shown, the defendant was the originator of the idea of a silver market in Seattle, a thing unthought of by anybody else. He was the only one who had taken the time and trouble to advise himself about it, and about how it should be conducted and carried on. Naturally, he passed his knowledge on to those who became identified in the movement. Also naturally, he advised with them and their salesmen respecting what he continued to ascertain, as far as he was able. Especially so, since he had become President of the Exchange, and hence felt in duty bound to keep track of what was going forward in the enterprise. And there is no testimony that he ever did more. It is submitted that the charge of the indictment, that the defendant engaged in business under the *names of the four firms* mentioned is wholly unsustained. Neither is it sustained that he operated or controlled them in the business they actually did with their customer. He owned and controlled Pierce Lonergan and Company, and nothing more. And he had no salesmen. As to the organization, status and "operation" of the

"so-called Seattle Silver Market," and the relations of the brokers who dealt thereon, the unquestioned testimony of the Government itself is as follows:

Coventry testified (R. 49):

> "The Seattle Metal Exchange was under control of the Board of Governors of the Seattle Metal Exchange (R. 69) to the best of my knowledge the Seattle Metal Exchange was controlled exclusively by four men, Pierce Lonergan, John R. Walsh, Louis Gill and George Goggin (R. 74) the Exchange and the Clearing House composed of these four member brokers was operated as distinct from the brokerage houses."

As previously noted the record discloses that the great London Silver Market is conducted by four firms (R. 70) and the New York Commodity Exchange had but six silver brokers (R. 203).

The relation of the defendant to the Exchange was similarly afforded by the Government. The witness Coles testifying for the government stated (R. 95):

> "Mr. Lonergan was the nominal head of the Seattle Silver Exchange. I do not know whether he was President or Manager, but I knew him as the head, or the authority. His advice was generally sought by all of the brokers and associated brokers, and salesmen as to matters of policy, forms to be used, interpretation of newspaper articles and the like that were coming out. Primarily my interest in making inquiries of Lonergan was to be sure that I complied with the rules and regulations of the exchange. He did not have direct authority to order me to buy or sell for any of my customers. His advice was simply accepted because of my confidence in him, and because of my respect for his knowledge on the subject."

The status and operation of exchanges in general, inclusive of "commodity" exchanges, is extensively examined and clearly stated in an article in one of our case authorities.

10 R. C. L. 1190-1210 particularly Sections 2, 5, 9, and 10.

This same subject matter was further elucidated by the defendant, particularly by reference to other authority (R. 297-298), quoting: "Risk and Risk-Bearing," by Charles O. Hardy, of the Brookings Institute.

In face of a state in the evidence such as the foregoing discloses, whereby a finding of innocence would at the very least be amply sustained, it is manifest how fatally prejudicial were the errors of which complaint is now made, the several groups whereof, as indicated in the opening of this brief, constitute the basis of the present proceeding. Discussion of this will now be had, in amplification of what appears in the brief already filed.

I.

1. The admission of Exhibit 75 was "plain error"; and deprived the defendant of due process of law. The erroneous admission of the Exhibits 76a and 76b, as being connected with Exhibit 75, further enhanced the error involved in the latter.

The assignments relating to these exhibits "have herein before been designated as Group 1." The subject matter has already been dealt with (Br. 14-21). The error of the Circuit Court in refusing to consider these assignments as a part of the twenty-eight (Op. 454) is also subject to all the considerations, as to their *form,* which will be brought out under the next succeeding heading herein, and it is respectfully requested that this be borne in mind. The chief vice,

however, of Exhibit 75, contributed to by 76a and 76b, is that relied upon in the former brief, as above indicated. At the present time, but little additional thereto will be said. The foundation of the contention here is that by the courts' action complained of, there was introduced into this case an element entirely foreign to the theory and purposes of any trial, and wholly destructive of the concept upon which, in any due and orderly fashion, any such trial may proceed. What was admitted was not, and could not be, evidence at all.

Thayer, Preliminary Treatise on Evidence, pp. 187, 195, 197, 263.

By the introduction of Exhibit No. 75, the jury was subjected to an extraneous and wholly unproper influence, which could, and by the outcome presumptively did, conduce to and result in the verdict rendered, as much as though the action and deliberation processes of the jury had been overborne by any other extraneous influence or force.

Frank v. *Mangum*, 237 U. S. 309, 312, 314, 327, 335, 336; 347 (dissent opinion Justice Holmes), 59 L. Ed. 969, 971-972, 979-980, 983-984; 988 (dissent).

The foregoing case dealt with the provision of the 14th Amendment as to due process of law which is analogous to the provision of the 5th Amendment as to the same subject matter.

In the instant case, the defendant was deprived of "due process" as guaranteed by the 5th Amendment, as well as of a trial by "an impartial jury" as guaranteed by the 6th Amendment.

And, even if this were not so, still the matter complained of is such as that, upon the entire record, it must be reviewed.

McCandless v. *United States*, 298 U. S. 342, 347-348, 80 L. Ed. 1205, 1209;
Cook v. *United States*, 138 U. S. 157, 184-185, 34 L. Ed. 906, 914;
St. Clair v. *United States*, 23 F. (2d) 76, 78 (C. C. A. 9);
Mexia v. *Oliver*, 148 U. S. 664, 673, 37 L. Ed. 602, 606;
Smith v. *Shoemaker*, 84 U. S. 630, 636-637, 639, 21 L. Ed. 717, 719;
McNutt v. *United States*, 267 F. 670, 673.

It is submitted that this error alone requires reversal of the conviction herein.

We present those errors under Assignments XVII and XVIII, referred to in the brief (Br. 22) as more properly and conveniently considered in connection with the error just presented.

Assignment XVII and XVIII.

These assignments relate to the admission in evidence (R. 188) of the Government's Exhibits Nos. 76a (Ex. R. 386, Test R. 185, 188) and 76b (Ex. R. 387, Test R. 187, 188). Both of these contributed to and were bound up in the errors inhering in the admission of Exhibit No. 75, which have just been discussed. As was pointed out at the time (R. 188), both are no part of the *res gestae* of the case charged in the indictment, are too remote in time, and are neither of them identified as connected with the defendant. Both are, on their own faces, *res inter alios acta*. No. 76a signed by "(M. L. H.)" is certainly no reply to No. 75, addressed to the defendant personally. And No. 76b similarly signed was stated by Mr. Atwood himself to have

been in reply to *a letter of his own*, dated August 19, (R. 185). Exhibit 75 is dated August 17. In respect to No. 76a, what happened, as the Government would have it inferred, was that Louis Martin Co., on receipt of the copy of No. 75 sent to them by Battle, Hulbert, Helsell & Bettens (R. 184, 186), compiled the required information on account of *sales which Louis Martin Co. itself* had made, and of which it had the knowledge and records. But no proper foundation was laid in the evidence for its introduction, and its authenticity was not established. Both Exhibits 76a and 76b are signed by initials, "L. M. H." The author was never identified or was authority established. The Exhibits are dated August 20th and 21st, respectively—more than eleven days after the nationalization of silver, August 9th, 1934, and more than 20 days after the termination July 31, of the alleged plan, as charged by the District Attorney (R. 40). Under such circumstances it should not be presumed that the exhibits were sent in the ordinary course of business. The regular business of the company had ceased. The authenticity of the exhibits was never established, and letters of course, do not prove themselves. The defendant did not figure in the transaction at all. No. 76a was obviously no answer by the defendant to No. 75. And no answer thereto by him was made to appear. No. 76b, by its own terms, negatives any connection with No. 75, since it refers to a letter *"of the 19th day of August"* which, as has been noted above, was the date of the letter which Atwood himself fixed (R. 185), as that of his own letter, which was never introduced in evidence.

These exhibits were not within the issues laid in the indictment. Their only effect if properly admissible for any purpose, would be to show cumulative evidence from which good faith or intent might be negatived or design shown. There is in the record no evidence of a transaction similar to that involved in the circumstance which these documents

were a part. The situation arose out of a demand for an accounting after the transaction to which it relates was closed. There is not in the record any other correspondence or evidence of this character. Inferences may properly be attached to this correspondence which may not properly be applied to any other disclosed in the record. An additional element is the fact that the transaction, to which the correspondences allegedly relates, is one occurring one hour previous to the President's proclamation, and allegedly made in anticipation of such proclamation. Again the circumstance does not conform to that of any other transaction disclosed in the record. Cumulative evidence introduced for the purpose of showing intent must be of circumstances similar to those from which like inferences may properly be made. To show design or plan such evidence must have conformity to circumstances within the issues. Neither Exhibit 75, 76a nor 76b come within these rules. Wigmore on Evidence (2d Ed.) Vol. 1, Sec. 302, p. 617. Further Exhibits 76a and 76b were not *res gestae*. Exhibit No. 75, dated August 17th, 1934, had already been properly ruled out (R. 187), as too remote in point of time (among other objections). It is indeed a novelty that alleged replies to that Exhibit made four days later could be considered other than more remote. The admission of these exhibits was prejudicial error, within the principles hereinbefore cited. But more than that, the error contributed to the error in admitting Exhibit 75. It has already appeared that the court finally admitted that letter, expressly because these two had been admitted (R. 189).

II.

It is further submitted that certain at least, and the most vital and prejudicial of the assignments of error included in the Circuit Court's general rejection at pages 5-6 of the opinion (R. 619), substantially comply with the spirit and purposes of the rule invoked by the court; but, in any event, they must be considered in this case.

The opinion states, pages 5-6:

> "Twenty-eight assignments (numbered 5, 9, to 25, inclusive, and 31 to 40, inclusive) are to the admission of and refusal to strike out evidence. The assignments *do not indicate* that any of this *evidence was objected to in the trial court.* They do not state *what objections,* if any, *were made, nor the grounds thereof,* nor the grounds, if any, on which appellant moved to strike out the evidence. Such assignments do not conform to our Rule 11 and will not be considered."
>
> *Cody* v. *United States* (C. C. A. 9), 73 F. (2d) 180, 184;
>
> *Goldstein* v. *United States* (C. C. A. 9), 73 F. (2) 804, 806.

The twenty-eight assignments thus disposed of involve various subject matters, and disclose different classes of error. It may be agreed that some of them may be too comprehensively stated, and too lacking in specific record reference, to require their consideration by that court.

But it is submitted and most earnestly urged that some of those assignments especially those presented herein come clearly within the spirit and purposes of former Rule 11, as that court has heretofore interpreted and applied it. And it is obvious that these errors are highly material and prejudicial in view of the state of the evidence.

The appeal from the District Court's judgment was filed May 23, 1936 (R. 21), and submitted on oral argument to

the Circuit Court February 1, 1937 (R. 448). The decision of that court was rendered and filed March 5, 1937 (R. 448). And rehearing denied May 10, 1937 (R. 457).

Rules of the Circuit Court of Appeals for the Ninth Circuit adopted November 1904 as amended June 15, 1926, were in effect as of the date and submission of the case (Manual of Federal Appellate Procedure (2nd Ed.), Cumulative Supplement by Paul O'Brien, 1936, Rule 11, page 164). This rule was amended December 22, 1936, to be effective February 1, 1937. (O'Brien, *supra,* page 164, reprint.).

Rule 11 as it was in effect when this appeal was taken, so far as is pertinent here, provided:

> "When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote *the full substance* of the evidence admitted or rejected."
>
> O'Brien's Manual (2nd Ed., p. 164).

The present form of the corresponding part of the Rule, effective February 1, 1937, is:

> "When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall *quote the grounds* urged at the trial for the objection *and the exception* taken *and the full substance* of the evidence admitted or rejected."
>
> O'Brien's Manual (2nd Ed., p. 164 (addendum).

The difference between the two forms of the Rule, in content of requirements for statement *in the assignments,* is readily apparent.

In *all* the assignments here presented, it appears upon inspection that the plan of statement adopted in *each* comprehends the following: First, there is a *narration* that "the court *erred in admitting* in evidence, and denying defendant's motion to strike, to which *exceptions were taken*

and allowed" certain evidence. Following this appears the *obnoxious evidence* in *totidem verbis*. Then appears a *narration* of the *evidential basis* upon which the evidence objected to was admitted. And this is followed by an itemized *narration* of the grounds upon which the evidence thus admitted was objectionable.

It is submitted that the foregoing plan of statement, in all substantial respects, complies with the rule, so long as assignments are permitted to be made at all by narration or *quotation of "substance."* By the *present* wording of the Rule, of course, narration in *any* form in an assignment of error appears no longer acceptable. But it is submitted that such is *not* the effect of former Rule 11, by which, of course, the present case is necessarily controlled.

By reference to the Bill of Exceptions in the transcript of the record on appeal in which the assignments of error are incorporated, it appears that in every instance, the evidence in question is *correctly reproduced* in the assignment; that objections *were* duly interposed and denied; and that exceptions were *actually allowed*. In urging the several assignments in the brief, page references to the transcript appear, whereby recourse to the record for corroboration and verification is facilitated. It is true that the grounds of objection as stated in the assignments do not appear in all instances in *totidem verbis* as in the Bill of Exceptions. They are itemized, clarified and amplified, *in their statement*. But it is submitted that the *gist of all* the grounds appearing in such amplified statements is represented in the grounds of objection actually stated to the trial court; whereby it does not appear that the appellant sought to shift his position, or inject into the appeal for consideration by the Circuit Court questions upon which the trial court had had no opportunity to pass. It is submitted that, under such circumstances, the language introducing the assignments: "The court erred in admitting—to which

exception was taken and allowed—the reasons such exhibit (or evidence) should not have been admitted, and that it should have been stricken'' constitutes the fair equivalent of a statement of the ruling of the court, the taking of an objection and the grounds presented to the trial court. Courts are not meticulous in mere wording, where substantial rights are at stake.

(*Simpson* v. *Dall,* 70 U. S. 460, 18 L. Ed. 265, 266.)

The court ruling, the objection and exception with the grounds specified will be found in fact to be those which were stated at the time. In some instances they may appear to expand that statement: But this is so only to the extent of drawing the legal inferences, or the legal conclusions, following from a mere general ground, of which necessarily, the trial court itself took, and was bound to take, judicial notice. It is respectfully submitted that all the assignments above enumerated were entitled to consideration by the Circuit Court.

In the part of the Circuit Court's opinion above noted, as authority for its ruling is cited *Cody* v. *U. S.,* 73 F. (2d) 180; and *Goldstein* v. *U. S.,* 73 F. (2d) 804. Both these cases cite as authority *Meehan* v. *U. S.,* 70 F. (2d) 857. All three cases are Ninth Circuit Court decisions. These cases when analyzed in their entirety disclose that that court had an established practice in such circumstances. This practice was to consider the sufficiency of assignments in connection with the particulars in the record, especially where the assignment contained any specification of error whatever. Both the *Cody* case and the *Goldstein* case cited show that they followed that practice in those cases. In the *Meehan* case no specification of error whatever was made, and none of them except one, made any mention, in any manner, of any objections ruling or exception. However (at P. 859, paragraph 4-7) in respect to ''assignment

19," it is said the question raised thereby, "was not presented to the trial court and need not be considered on this appeal," under Rule 11. Manifestly, this could not become known, except by reference to the record in the bill of exceptions. The necessary inference it would seem, is that had the record supplemented the assignment it would have been sufficient to require the court's consideration. But, in any event, it discloses the court having recourse to the record, to test the assignment.

Such being the basis and the scope of the decision in the *Meehan* case, it is submitted that its proper content, as an interpretation of former Rule 11, should not be taken or considered to have had engrafted upon it essentially new and different requirements by the *Cody* and *Goldstein* cases, which expressly rest upon it. Rather, it is submitted, should those cases be interpreted merely as expressions and illustrations of the rule of the *Meehan* case. In which event, the assignments in the instant case, now under discussion fully measure up to the spirit and purposes of former Rule 11; and this fact is fully demonstrated, if the original record in the bill of exceptions is looked to, as has been seen to be customary.

The assignments in the instant case certainly advised both the court and opposing counsel of the precise errors that would be relied upon, and the grounds upon which the alleged error would be claimed to inhere. That such, and such only, is the spirit and purpose of any rule such as former Rule 11, is apparent from consideration of *Seaboard Air Line R. Co.* v. *Watson,* cited and quoted in the *Meehan* case, *supra.* In that case the Supreme Court held:

> "Every appeal must be accompanied by an assignment of errors which shall 'set out separately and particularly each error asserted'. Rev. Stat. 997, U. S. C. Title 28, 862, Rule 9. The purpose is to enable the court, as well as opposing counsel, readily to perceive

what points are relied on. The substitution of vague and general statement for the prescribed particularity sets the rule at naught. (Citing cases.) And as the rule makes for convenience and certainty in the consideration of cases the court may, and generally it will, disregard a specification that is so uncertain or otherwise deficient as not substantially to comply with the rule even if the opposing party raises no question and treats it as adequate. The quoted assignment amounts merely to a complaint that the Supreme Court erred in not reversing the judgment of the trial court because 'in the trial of this case' the 'scope and effect' of the section deprived appellant of its property in violation of both the due process and equal protection clauses. An allegation of error could scarcely be more indefinite. It does *not* identify *any ruling* at the trial or specify any basis for the assertion of deprivation of constitutional right. It presents *no question* for our consideration." *Seaboard Air Line R. Co.* v. *Watson*, 287 U. S. 86, 77, L. Ed. 180, 184.

It thus results, it is submitted, that in order to know the content and meaning which the Circuit Court had previously given to former Rule 11, which content and meaning it incorporated, by citation, in the *Cody* and *Goldstein* cases, the case of *Meehan* v. *United States* must be followed, and by that case, and also by the others, as has been seen, in making an ultimate determination of the question of the *sufficiency* of a particular assignment, the bill of exceptions is *customarily consulted* and considered. It is also respectfully submitted that, when he prepared his bill of exceptions and his assignments of errors, defendant had the right to expect the two things *would* be taken and read together; and that he had the further right so to expect, by virtue of the decisions above mentioned and considered, particularly *Meehan* v. *United States.*

Thus far, the purpose has been to show that, in all essential substance, the enumerated assignments are clearly

within the spirit and purpose of former Rule 11. It will now be urged that, even if those assignments, or any of them, for any reason whatsoever are deemed to fall below the standard actually set by that Rule, nevertheless, the errors they challenge are such that, in view of the evidence in the case, they should still be considered by the court since they were vitally prejudicial to the defendant.

Rules, after all, are not sacrosanct. They are but means to an end. The primary purpose of all procedure, and of all litigation, is that the respective rights of contending parties may be justly preserved, and justly determined in the outcome. *Brasfield* v. *United States,* 272 U. S. 448, 450, 80 L. Ed. 345, 346, 47 Sup. Ct. Rep. 135; *New York Central Railroad Co.* v. *Johnson,* 279 U. S. 310, 318-19, 73 L. Ed. 706, 710-11.

The instant case is not civil, but criminal, and upon its outcome depends this defendant's liberty and fame. In such a case, it has been said by the Supreme Court:

> "In criminal cases *courts are not inclined to be as exacting* with reference to the specific character of the objection made as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not *properly raised* at the trial by *objection and exception. Wiborg* v. *United States,* 163 U. S. 632, 659, 41 L. Ed. 289, 299, 16 Sup. Ct. Rep. 1127, 1197." *Crawford* v. *United States,* 212 U. S. 183, 194, 53 L. Ed. 465, 470.

In the instant case, it is not required to go so far. All that is here said against these assignments is that *in form* they do *not sufficiently indicate and reproduce the trial record* to entitle them to consideration under former Rule 11.

The conditions under which an error appearing is of such character as that it will be *presumed* to have preju-

diced substantial rights of the party, and so, to *require* correction at the hand of a court, are well stated in the case of *Little* v. *United States* (C. C. A. 10), 73 F. (2d) 861. This was also a mail fraud case.

At pages 866-867:

> "We conclude that where the entire record affirmatively discloses that an error has not affected the substantial rights of an appellant, it will be disregarded. But where error occurs which, *within the range of a reasonable possibility,* may have affected the verdict of a jury, *appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict.* So to hold would, as a practical matter *take from a defendant his right to a fair trial.* * * * The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

The evidence in the instant case aside from all else, was most certainly "conflicting", if, as a matter of fact, it did not disclose the defendant's complete innocence of the charges. It is submitted that from the whole record it cannot be said that a substantial right of the defendant was not prejudicially effected by the errors here presented. Particularly is this true of Assignments XVI, XVII, XVIII heretofore presented.

In the light of the foregoing authorities, attention will now be drawn more closely to the rejected assignments IX to XV inclusive and XXI, XXXI and XXXII. All of them were of most vital concern to the defendant because they challenged the very foundations of the Government's case.

A.

Assignment IX-XV.

The errors here involved have been designated as "Group 2." They were likewise brought forward upon the petition (Br. 11, 22). These assignments challenged the admissibility of the several exhibits which constituted the basis

of the several counts of the indictment. It is impossible at this time to present them separately and in light of the precise record applicable to each. Inspection of the Exhibits will disclose that each is a third party document. Repeatedly there was introduced a large mass of such third party evidence without foundation laid connecting any of such evidence with the defendant. The materiality or relevancy of such evidence was not required to be established by the trial court. In fact, the trial was so conducted that even in matters so vital as the Exhibits forming the indictment counts the government failed in many instances, and was not required by the trial court to prove the gravamen of the offense, the use of the mails. An example only may be stated here, exhibit #52 the basis of count 3 of the indictment is a so-called market letter dated July 13, 1934. A witness Given (R. 138) testified he received it in the mail. Whereupon it was admitted in evidence, over objection upon government counsel statement (R. 138) that it was predicated on "the testimony of Mr. Coventry under which we introduced as one of the exhibits in this case in a whole group of Market letters that were sent out——". The testimony of Coventry (R. 50) covered a period "between the first week of October 1933 and the end of December 1933." This testimony of course does not include Exhibit 52 which was dated July 13, 1934. So if space permitted we might show in each instance a complete relaxing of the rules of evidence by the Court in requirements of proof regarding these vital exhibits. This method of trial was extended as well to a confusing and disorderly mass of third party confirmations, orders and correspondence. Particularly were the vital exhibits introduced over objection without requirement of the clear, positive evidence of the use of the mails as required under the statute. All other considerations apart, each one of them rested, and could only rest, upon the defendant's liability for their

contents and mailing, upon some theory of agency (*Barrett* v. *United States,* 33 F. (2d) 115, 116). It must here suffice to say that, in the considerations under an earlier part of this argument, as is again submitted, it has been made to appear that the theory of this defendant's responsibility and liability for the statements and acts of the various concerns other than his own, and their respective salesmen, is *not* sustainable upon the evidence appearing. That such evidence, admitted as it was, prejudiced the defendant is obvious without argument, hence, it is submitted that under the authorities above cited, those assignments certainly demanded the attention of the Circuit Court.

B.

Assignments XXI, XXXI, and XXXII.

These assignments involved errors in the admission of hearsay evidence and were brought forward (Br. 11, 20) and herein referred to as group 3 (*supra,* P. 2).

The errors under assignments Nos. XXI, XXXI and XXXII, illustrating as they do a course of conduct followed throughout the trial, establish that the error of the admission of hearsay evidence permeated the whole proceedings, and prevented the defendant from having a fair trial. These errors are typical of occurrences throughout the entire trial, and it is earnestly submitted that, along with the errors already considered herein, they permeated the whole case, showed illegal use of evidence, and assured an erroneous verdict. It is believed that but slight consideration of the record setting of these errors will show them to have been of such nature as warranted a consideration of them, regardless of the form in which they may have been assigned.

These assignments go to the admission of hearsay testimony, over objection and exception. They refer to statements and representations alleged to have been made to

the particular witness concerned by third parties not in anywise shown to have been related to the defendant. So far was this carried that, it is submitted, the case appears to have been conducted upon the theory that this defendant was responsible and liable for all actions and all representations made by *any* broker or *any* salesman, regardless of agency, authorization or ratification. Such, it is further submitted, is, of course, not the law. If the instances of this were but few and fugitive, its importance or significance would not become apparent. But when it is found to be continual and consistent, then the fatal consequences of the cumulative effect becomes all too manifest. In truth and in fact, it permeated the record beyond any countervailing considerations.

It has already been seen that the indictment charged the defendant with conducting an alleged brokerage business under four firm names, and operating the Seattle Metal Exchange. The evidence introduced to support this has already been analyzed, and found to be fatally wanting in probative value. Attention to all this is again respectfully invited.

But in particular, and for its relation to the assignments now under consideration, attention will be given to certain aspects not previously fully developed. These relate to the Government's witness, Norman E. Coles. The record discloses that the Norman Edward Co. was an independent brokerage concern, and not an agent of any other broker. The Norman Edward Co., which was Norman E. Coles, as a non-member of the Exchange was bound by the Rules and customs of the Seattle Metal Exchange. He contracted as a principal with his correspondent broker, Louis Martin Co., who was a member of the Exchange. (Exhibit A. 3, R. 395 and 396). Coles so testified. (R. 93). His account with Louis Martin Co. was carried in his firm name and not that of his customers (R. 93), and his orders or con-

tracts with Martin & Co. were signed by his firm and not his customers (R. 92; R. 395, 396, Ex. A-3), and he signed and entered into a margin contract with Martin & Co. (Exhibit A-2, R. 94). He in turn required his customers to enter into an independent, though similar, contract with him (R. 91 and Ex. A-2, R. 75). When *his* account required more margin, it was demanded of him, not his customers, and he was required to make it up (R. 93). The indictment does not charge nor was it claimed in the trial that Coles, or Norman Edward Co., was a co-defendant, co-conspirator, or associate of the defendant.

Twenty-two "investor" witnesses in all were called by the government. None claimed or asserted any obligation due them by the defendant, Lonergan, or that they had any contract or other relationship with him.

All of these witnesses signed marginal agreement cards or "signature" cards (R. 75-77, 91). These disclose clearly that the witnesses knew and understood they were making contracts on "futures". While the agreement provided that contracts would be subject to the rules and regulations of the Seattle Metal Exchange, (Ex. A-2 R. 75) it also provided that the transaction might be made on any other Exchange. This agreement further provided (R. 76) that in the event of default by the customer, the account could be liquidated on any market or exchange and at public or private sale. The independence of the broker from the Seattle Exchange must certainly have been known and accepted by the witnesses. The independence of the brokers in transactions with each other on the Exchange has been heretofore commented on and arises out of the very essence of the transaction. Of the twenty-two witnesses, fifteen "investor" witnesses testified to transactions with the independent broker, Coles. They were Bolling (R. 142); Carroll (R. 123); Cooper (R. 98); Engle (R. 78); Enquist (R. 191); Fend (R. 150); Headley (R. 157); Knoff (R. 140);

Maegher (R. 152); McFaddin (R. 127); McGrew (R. 148); Romer (R. 149); Shattuck (R. 134); Spear (R. 120); and Streepy (R. 153). Among these witnesses were those who testified to the loss of the proceeds of life insurance policies (Knoff); the loss of savings to be used for further education (McFaddin), and others. The hysterical manifestations during this parade of witnesses created such condition in the trial of the case as to require defense counsel repeatedly to call the court's attention to the condition being created and finally to move for a mistrial (R. 141).

In respect to no one of them was any agency from this defendant or any authorization by him, for any statements made to the several witnesses. Yet, actually several weeks of the trial were devoted to the introduction of this evidence, in spite of the most strenuous efforts on behalf of the defendant to show its wholly inadmissible nature, and to exclude it from the jury. In spite of everything, it was allowed to go in. Such practice has been known before. But it has uniformly met with the condemnations of appellate courts.

Hart v. *U. S.*, 240 Fed. 911;
Beck v. *U. S.*, 33 F. (2d) 107;
Barrett v. *U. S.*, 33 F. (2d) 115;
U. S. v. *Brown*, 79 F. (2d) 321.

A similar situation to the instant case is disclosed in *Beck* v. *U. S.*, 33 F. (2d) 107, 112; this was a mail fraud case in which there had been a conviction.

> "3. The Admission of Evidence, (a) over repeated and vigorous objection, the court admitted evidence of conversations between a great many contract holders and a number of salesmen employed by the company, not had in the presence of Beck and not shown to have been authorized by him. The court announced, early in the trial, the theory on which the case was tried:
>
> "But the ruling of the court is, what Mr. Barrett may have said or what the officers of the company of which

he was president may have said, in the discharge of their duties in connection with that company, are binding upon the defendant."

"This ruling was upon the evidence of one Shea, who was not an officer but a salesman, and was adhered to throughout the trial.

"In our opinion, this was error; if error, it was highly prejudicial, for the recollections of a procession of contract holders, mostly women, who had lost their money, of oral promises and representation made some four years before, were lurid and vivid. Guilt is personal and not vicarious. * * * It must be true that no man can be held liable for a false pretense or promise if he neither made the pretense nor authorized it, * * * the doctrine of respondent superior that sometimes holds a principal for representations he neither authorized nor ratified, expressly or impliedly, is a doctrine of civil liability, and not of criminal responsibility. * * * But the trial proceeded on the theory stated by the court that any representation made by those employed by the company was competent, irrespective of Beck's knowledge, authority, or ratification; and this was error. * * * This testimony seems to be prejudicial as well as immaterial."

In a civil case—*Waldron* v. *Waldron,* 156 U. S. 361, 39 L. Ed. 453, in damages for alienations of affection, a divorce decree was admitted for limited purposes. In final argument the entire exhibit was unlawfully urged for general purposes of the case. This court stated at (p. 459).

"Thus the case in its entire aspect, was seemingly conducted in such a manner as to render the illegal use of evidence possible and to cause the harmful consequences arising therefrom to permeate the whole record and render the verdict erroneous * * *.

And at page 460:

"We have not rested our decree upon the question of the admissibility of this evidence, because the mere il-

> legal introduction of irrelevant evidence does not necessarily constitute reversible error, and hence we have been compelled to consider, not alone the admission of the irrelevant evidence, but also the illegal use which was made of it."

In *Hermansky* v. *U. S.*, 7 F. (2d) 458 (C. C. A. 8), a criminal case it is said (p. 460):

> "The government contends * * * that under section 269 of the Judicial Code (Comp. St. Sec. 1246) the error, if such, would not be a reversible one. * * * While we consider the introduction of this evidence as error, we would not deem it sufficient, standing alone, to require a reversal. (Citing cases.)"

and at p. 461:

> "While, under amended section 269, a case will not be reversed for technical errors, which do not affect the substantial rights of defendant, and while each particular error herein referred to may not in itself affect such rights, yet we feel that, when these various errors are considered together, it leads to the inevitable conclusion that defendant did not receive that fair and impartial trial to which he is entitled under the law."

Under the authorities cited: It is submitted that the error involved in the assignments now under consideration constituted substantial error, both in individual instances and in the accumulative effect of all such errors. In the light of the whole record it is apparent that illegal use was made of this evidence and probably resulted in an erroneous verdict. This, it is submitted, was error of such nature as to warrant consideration by the Circuit Court, under the circumstances of this case.

Conclusion.

As was urged at the outset, it is indispensable in this case to get a perfectly clear picture of the *whole* of what it presents, *without* distortion or over-emphasis in *any*

part. When this is done, it is submitted it becomes wholly apparent that *all* difficulty encountered by the Seattle Metal Exchange, or by any of those having any dealings with it, was due solely and entirely to the *changes* in legislation and national policy wrought by the silver purchase act of *June, 1934,* which finally resulted in removing silver from the field of trading. Until this dislocating act was passed, the Seattle market was functioning as well as was its prototype in New York City. *No difficulty* whatever had arisen over the whole period from 1931, and most certainly none since *June, 1933.* But when that enactment came in June, it caught the enterprise in full flight, and paralyzed all its faculties. What to do, or how to do it, was not then known. Nor could it be, with any certainty, for some time to come. Steps taken under such circumstances must be judged accordingly. Without the fullest cooperation in such case, complete salvage is certainly impossible. And it cannot appear strange if the holders of contracts who fail to perform as the unforeseen exigency demands do not come out unscathed. But, for the occurrence of such radical national action, neither the market, nor those conducting their business upon it, can properly be held to blame. Certainly not this defendant whose relations to the whole were what the evidence has been shown to establish them. The act of 1934 ought not to be permitted to bring about his branding as a criminal. Yet, the present conviction brings that very thing to pass.

In conclusion it is submitted that the error of the trial court in admitting into evidence Exhibit 75 was such grave and prejudicial error, transcending all rules of evidence, as to foreclose the arrival at a verdict by the jury by any rational process free from prejudice, that this error was one of substantive law in that it subverted the established procedure of trial under the Anglo-American system of trial by jury. Such error it is submitted is plain substan-

tial error. And an examination of the Exhibit discloses that in the light of the whole record the defendant could not be other than by its admission in evidence. In any event the record does not affirmatively show that the defendant was not prejudiced and therefor he is entitled as a matter of right to a new trial, under established law, applicable to criminal trials.

In connection with the admission of hearsay exhibits including, even to those made the basis of various counts of the indictment; and in connection with hearsay testimony of the class demonstrated under assignments XXI, XXXI and XXXII, the whole record discloses that the trial was so conducted as to permit these errors in evidence to permeate the whole record, and in some instances to permit the illegal use of such evidence, and resulting in an erroneous verdict.

It is submitted that all of these errors were of such nature as to have required the Circuit Court of Appeals for the Ninth Circuit to consider and pass upon them under the circumstances of this case; and the failure of that court so to do sanctioned the error of the trial court. These errors constituted such a departure from established judicial procedure as to warrant the exercise of the supervisory powers of this court.

Wherefore the Petitioner prays that the judgment of conviction herein be reversed and set aside.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1937.

No. 121

PIERCE LONERGAN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 449–457) is reported in 88 F. (2d) 591.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 5, 1937 (R. 457). Rehearing was denied May 10, 1937 (R. 457). The petition for a writ of certiorari was filed June 8, 1937, and granted October 11, 1937 (R. 458). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the

Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED[1]

1. Whether the Circuit Court of Appeals erred in refusing to pass upon certain of the petitioner's assignments of error on the ground of nonconformity to its Rule XI.

2. Whether the admission in evidence of Exhibit No. 75, consisting of a letter written to the petitioner on behalf of an investor, was error.

3. Whether the Circuit Court of Appeals abused its discretion in refusing to notice as plain error the admission in evidence of Exhibit No. 75, notwithstanding the insufficiency of the petitioner's assignment of error relating thereto.

STATUTE AND RULE OF COURT INVOLVED

Criminal Code, Section 215 (U. S. C., Title 18, Section 338), as far as is material, reads as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the

[1] The petitioner has not made a statement of the questions involved. We have formulated these questions from the specification of errors contained in the brief in support of the petition for writ of certiorari (p. 11) and present and discuss them in the order we believe most logical.

purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any post-office; * * * to be sent or delivered by the post-office establishment of the United States; * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Rule XI of the Circuit Court of Appeals for the Ninth Circuit provides:

> The appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No appeal shall be allowed until such assignment of errors shall have been filed. Citation shall issue immediately upon the allowance of the appeal. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis,* whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its

option, may notice a plain error not assigned.[2]

STATEMENT

The petitioner was found guilty by a jury in the District Court of the United States for the Western District of Washington upon seven counts of an indictment charging him and one John R. Walsh with using the mails in furtherance of a scheme to defraud, in violation of Section 215 of the Criminal Code (R. 19). The petitioner's co-defendant Walsh interposed a plea of *nolo contendere* (R. 29).

The petitioner was sentenced to three years on each of the counts upon which he was convicted, the terms of imprisonment to run concurrently (R. 20–21). The judgment of conviction was unanimously affirmed by the Circuit Court of Appeals for the Ninth Circuit (R. 449–457).

This case, as presented to this Court by the petition for writ of certiorari, involves primarily questions as to the admissibility of evidence. The nature of the evidence and the circumstances surrounding its admission are developed in the Argument, *infra,* and need not be stated here. The petitioner urges that much of the evidence admitted was not sufficiently connected with him. In order to show the connection of the petitioner with this

[2]As indicated in the petitioner's brief (Br. 40), this rule was amended subsequent to the filing of the petitioner's assignments of error in the District Court (R. 399), and consequently the amended rule is not applicable in this case.

evidence and to show his responsibility for certain statements and representations appearing in the evidence, a summary of the Government's evidence showing the background of the case—i. e., the organization, operation and business of the Seattle Metal Exchange and the participation in and influence upon the exchange of the petitioner—is set out as Appendix A, *infra,* p. 34.

SUMMARY OF ARGUMENT

1. Petitioner's assignments of error which were not considered by the court below clearly did not comply with Rule XI of that court as repeatedly and uniformly construed and applied by it and therefore did not merit consideration. In any event, the evidence the admission of which was complained of in these assignments of error was properly admitted.

2. Exhibit No. 75, when considered in connection with Exhibits Nos. 76–A and 76–B, was properly admitted in evidence, whether it be regarded as part of a course of dealings and correspondence between the parties, which, with the other evidence, tended to show the fraudulent intent of the petitioner and the existence of his scheme to defraud, or whether such exhibit be regarded as evidencing a tacit admission in the light of the equivocal replies thereto which failed to deny the statements contained therein.

3. The court below did not abuse its discretion in refusing to notice as plain error the admission in

evidence of Exhibit 75. Under its Rule XI the court below, at its option, may notice a plain error not properly assigned. This does not mean that the court is under a mandatory duty to notice an insufficiently assigned error, but only that in the exercise of a sound discretion it may notice an obvious error of a substantial character in order to prevent a miscarriage of justice. The error, if any, in the admission in evidence of Exhibit 75 was not of such a nature as to affect the petitioner's substantial rights.

ARGUMENT

I

THE COURT BELOW PROPERLY REFUSED TO CONSIDER THOSE ASSIGNMENTS OF ERROR NOT CONFORMING TO ITS RULES. IN ANY EVENT, THE ADMISSION OF THE EVIDENCE COMPLAINED OF WAS NOT ERROR

A. Petitioner contends that the Circuit Court of Appeals erred in refusing, on the ground of nonconformity to its Rule XI, to consider certain assignments of error, particularly Nos. IX to XVIII, XXI, XXXI and XXXII.

The pertinent portion of Rule XI reads as follows:

> When the error alleged is to the admission or the rejection of evidence the assignment of errors shall quote the full substance of the evidence admitted or rejected.

In *Goldstein* v. *United States*, 73 F. (2d) 804, at page 806, the court below, in construing and applying the portion of Rule XI here involved, said: "The assignment of error must not only quote 'the full substance of the evidence admitted or rejected,' but it must also state the error asserted and intended to be urged. This requires that the objection and ruling of the court upon the objection and the exception to the ruling be incorporated in the assignment of error."

Thus the court below, in unmistakable words, announced that thenceforth assignments of error not complying with its construction would not be considered.

Since its ruling in the *Goldstein* case the court below has uniformly and consistently followed this interpretation and has refused to consider assignments of error not conforming thereto. See *United States* v. *Alcorn*, 80 F. (2d) 487; *Mullaney* v. *United States*, 82 F. (2d) 638; *Girson* v. *United States*, 88 F. (2d) 358. The *Goldstein*, *Mullaney*, and *Girson* cases involved felonies.

It is fundamental that errors must be properly assigned in the record to present a question for review on appeal. Petitioner's assignments of error Nos. IX–XVIII (R. 400–417), XXI (R. 419), XXXI (R. 426) and XXXII (R. 426) clearly did not comply with the rule as interpreted in the *Goldstein* case. They did not incorporate "the objection

and ruling of the court upon the objection and the exception to the ruling.". Reasons are given in the assignments why the evidence should not have been admitted and why it should have been stricken, but it does not appear from the assignments what, if any, reasons were urged *at the trial* as the basis of the objections. The requirement that an assignment of error set forth the grounds of the objection and the ruling of the court thereon as well as the exception to the ruling is a salutary one, making for convenience and certainty in the consideration of cases by the Circuit Courts of Appeals.

Petitioner's assignments of error having failed to comply with Rule XI, he is in no position to complain of the refusal of the court below to consider them, for, as was said by this Court in *Seaboard Air Line Ry.* v. *Watson,* 287 U. S. 87, 91:

> It is essential to a proper presentation of points relied on for reversal that the statute and rules of court requiring and governing the forms of assignments of errors be complied with.

B. The petitioner attempts to show (Br. 46–53) that the errors thus assigned were of such a nature as to affect adversely his substantial rights, and, upon the assumption that his assignments of error were within the spirit and purpose of Rule XI, asserts that the judgment of the court below should therefore be reversed. It having been clearly shown that the petitioner's assignments of error did not comply with Rule XI as construed by the court

below, it is, of course, unnecessary to show that the evidence the admission of which was the basis of these assignments of error was properly admitted. Nevertheless, in order to dispel any possible doubt that might arise from a reading of the petitioner's brief as to the propriety of admitting the evidence complained of, we shall set forth the reasons why this evidence was properly admitted.

Exhibit No. 52 (R. 377–381), one of the indictment letters, is alleged by the petitioner to have been improperly admitted in evidence. This exhibit was a market letter which was sent out almost a month after the passage of the so-called Silver Purchase Act by Congress in June, 1934,[3] and which set forth in extravagant terms the alleged highly beneficial effect of that Act upon the silver market, and the splendid opportunity thereby afforded to investors in silver. This exhibit was identical with one of a group of market letters constituting Exhibit No. 3, which exhibit was admitted without objection (R. 50). One Coventry testified that these market letters were "mailed under the direction of Mr. Lonergan" (R. 50). He further testified that between October and December, 1933, he *compiled* market letters under the direction of the petitioner, but his testimony respecting their mailing was not, as assumed by the petitioner, limited to the period between October and December, 1933. Exhibit 52 having been mailed under the direction of the petitioner, it was not a third-party docu-

[3] Act of June 19, 1934, c. 674, 48 Stat. 1178.

ment, but rather an act by the petitioner in carrying out the scheme to defraud and hence was properly received in evidence.[4]

The petitioner also alleges as error (Br. 48) the admission in evidence of the testimony of several investors respecting representations and statements made to them by one Norman E. Coles, an associate broker, and by some of the salesmen. This testimony is alleged to be objectionable as hearsay on the ground that there was a lack of showing of any agency or any authorization by the petitioner for any of these statements.

The petitioner's authorization of and responsibility for the representations and statements of Coles and the salesman cannot be doubted in the light of the following evidence:

Lists of prospective customers were furnished to the salesman by the petitioner (R. 44). He conducted frequent meetings attended by the brokers, agents, and salesmen, at which he gave explanatory talks, instructions and directions and made representations and statements which were repeated by

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[4] The trial court gave the following instruction bearing upon this evidence (R. 352):

"INSTRUCTION NUMBER XXII

"Unless you are convinced by the evidence beyond a reasonable doubt that the defendant either personally directed or ratified or caused the mailing of the letters referred to in the various counts of this indictment, even though you should find the fraudulent scheme alleged in this indictment existed, such letters are not to be considered against the defendant Lonergan."

the salesmen and agents to the investors in reliance upon and pursuant to the directions of the petitioner (R. 43, 44, 46, 84, 163). Coles testified:

> The representations and statements I made to investors was under the authority of Mr. Lonergan [R. 86].
>
> I followed Mr. Lonergan's representation insofar as it related to silver, and the instructions he gave me with regard to silver contracts. In other words I repeated what he said to me and in those meetings [R. 89].

The petitioner likewise made representations and statements to the salesmen and agents individually and also to investors (R. 46, 85). The following customers of Coles testified to conversations with and representations made by the petitioner: Engle (R. 78, 85); Cooper (R. 98, 99); Spear (R. 121); Carroll (R. 124); Shattuck (R. 135); Bolling (R. 142); Romer (R. 150); Headley (R. 158); Enquist (R. 191). Before introducing the testimony of investors as to statements and representations of the agents and salesmen, counsel for the Government had amply shown the petitioner's authorization and responsibility for those representations.[5]

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[5] The trial court gave the following instructions upon this evidence (R. 352–353):

"INSTRUCTION NUMBER XXIII

"Conversations had between particular salesmen or brokers and purchasers, regardless of the nature of such conversations not had in the presence of the defendant, Pierce Loner-

The case of *Osborne* v. *United States,* 17 F. (2d) 246 (C. C. A. 9th), certiorari denied, 274 U. S. 751, presents a situation very similar to the facts at bar. The following language from that case (p. 249) supports the admissibility of this evidence in the instant case:

> A large number of the purchasers of lots or sections were permitted to testify, over objection, to representations and statements made to them by the salesmen through whom the purchases were made. This testimony was objected to on the ground that it was hearsay and that the statements were not authorized by the plaintiffs in error. If this

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gan, are not binding upon him, unless you find that defendant actually authorized the one making the particular misrepresentations, or ratified them afterwards. The authority to make representations to be binding upon the defendant must be based upon evidence beyond a reasonable doubt showing such authorization, or showing a ratification of the misrepresentation, and the authority cannot be based upon mere presumption or doubtful inference or guess work.

"INSTRUCTION NUMBER XXIV

"If you find from the evidence that isolated salesmen at various times may have made what, in your judgment, amount to misrepresentations were not made pursuant to the orders of defendant or pursuant to any general scheme to defraud devised by the defendant as charged, or in pursurance of any general plan or idea agreed upon devised by the defendant, but were mere isolated incidents made without actual authority of defendant and not ratified by the defendant, then, you must, even though you find said misrepresentations to have been made in isolated cases, find the defendant not guilty of having made such misrepresentations."

> testimony related to but a single transaction, there would be merit in the objection, but, when we consider the fact that the plaintiffs in error *maintained a school for the instruction of salesmen,* and issued bulletins and circulars for their guidance, and that the representations made by the different salesmen were in many instances similar in tone and were to some extent at least based upon the statements and information contained in these bulletins and circulars, we think the jury were warranted in finding that the statements and representations complained of were so made pursuant to a general plan or scheme adopted and sanctioned by the plaintiffs in error. [Italics added.]

See also *Whitehead* v. *United States,* 245 Fed. 385 (C. C. A. 5th); *Pandolfo* v. *United States,* 286 Fed. 8 (C. C. A. 7th), certiorari denied, 261 U. S. 621; *Ridenour* v. *United States,* 14 F. (2d) 888 (C. C. A. 3d); *Mitchell* v. *United States,* 23 F. (2d) 260 (C. C. A. 9th).

Thus, even if the petitioner's assignments of error did comply with Rule XI, which we urge was not the case, any argument of the petitioner as to the inadmissibility of this evidence is without weight. The evidence was properly admitted and was covered by fair instructions by the trial court.

II

ADMISSION OF EXHIBIT NO. 75 WAS NOT ERROR

Petitioner's entire contention that the court below erred in refusing to notice as "plain error" the

reception in evidence of Exhibit 75, described below, is premised on the assumption that Exhibit 75 was inadmissible for any purpose. We cannot accept this hypothesis. We submit that the admission of Exhibit 75, when considered in the light of the testimony that preceded it, the letters which were written in response to it, and the insufficient objections made to its reception, was not error.

Exhibit No. 75, Appendix, *infra*, p. 41, was a letter written to the petitioner by an attorney, Joseph E. Gandy, for and on behalf of his client, A. M. Atwood, an investor who had been investing in silver futures contracts through Louis Martin Company. A copy was sent to Louis Martin Company (R. 186). The letter set out the transactions Atwood had had with Louis Martin Company and the conferences Atwood had had with the petitioner and Walsh, demanded certain information as to the sale of Atwood's silver options, and advised the petitioner that Atwood was defrauded by the misrepresentations of the petitioner and of Walsh and that he would seek legal redress if necessary to recover the damages caused thereby.

Prior to the writing of the letter which constitutes Exhibit No. 75, the following transactions and correspondence between Lonergan and Atwood respecting Atwood's account had taken place (R. 183–184): After receiving a letter personally from the petitioner and frequent conversations with him in which Lonergan stated that he did not think

there was any question but that silver would go to a dollar an ounce, Atwood began to deal in silver futures contracts through Louis Martin Company. Upon the break in the silver market, Atwood received a telegram demanding payment of $400 more margin. Atwood deposited the $400 additional margin in escrow in the First National Bank of Seattle, which bank sent a letter to Louis Martin Company informing it of this deposit. Representations were made to Atwood by Lonergan that the drop in the price of silver was due to a syndicate of investors dumping 200,000 ounces of silver on the Seattle Exchange through P. A. Jordan and Company, and that there was a law suit for $150,000 pending against Louis Martin Company which might result in garnishment proceedings against the bank account of that firm. These representations at least as to the syndicate were false (R. 105, 106). Atwood asked the petitioner if the latter could "fix this thing up," and was told "to see Walsh." Apprised of this conversation, Walsh gave Atwood a release of the $400 deposited with the bank, plus $17.74, which represented all that Atwood got out of his investment. Thereupon the $400 deposit was returned to Atwood. It was at this stage of the transactions respecting Atwood's account that Exhibit 75 was written.

By reason of the statements and request for information contained in Exhibit 75, two letters were written in response thereto by J. R. Walsh, the

nominal head of Louis Martin Company. His name was signed to them by one M. L. H., who was undoubtedly Mary L. Herman, Walsh's stenographer (see R. 217). One of these letters, Exhibit 76–A, Appendix, *infra,* pp. 43–44, was addressed to Atwood's attorney, Gandy, informing him that certain silver options of Atwood, about which information had been requested, had been sold to P. A. Jordan and Company. The other letter, Exhibit 76–B, Appendix, *infra,* pp. 44–45, was addressed to Atwood, and after acknowledging Atwood's communication "making certain statements through your attorneys", offered to reinstate Atwood's account if the latter would deposit with Louis Martin Company the sum of $2,238.75.

Both Atwood and Gandy identified all three letters and testified as to the writing of Exhibit 75 and the receipt through the mails of Exhibit 76–A and Exhibit 76–B (R. 184–188).

It is the petitioner's theory, as disclosed by the cases cited by him and the tenor of his argument, that Exhibit 75 was not answered, acted upon, or brought to his knowledge, and hence that the admission of this exhibit, in no way connected with the petitioner, was prejudicial error. Moreover, the petitioner bases virtually his entire argument upon a misconception of the purpose for which the exhibit was received. The exhibit was not, as assumed by petitioner, received in evidence as proof of the petitioner's fraud or fraudulent representations.

It may be conceded that the admission in evidence of Exhibit 75, alone and unexplained, would be difficult to justify. It was in part a complaint in behalf of a customer of ill treatment at the hands of the petitioner and a demand for both information and redress. Had Lonergan ignored it, and had no reply been made to it, the letter would have no place in the evidence. But that is not the case. Exhibit 75 was admitted only after the answering letters, Exhibit 76–A and Exhibit 76–B, had been received, and as part of the whole transaction between the parties respecting Atwood's account (R. 189). That Exhibits 76–A and 76–B were in effect written in response to Exhibit 75 is apparent from the language of Exhibits 76–A and 76–B. Thus Exhibit 76–A, addressed to Gandy, states: "Following is the information requested by you." Exhibit 76–B, addressed to Atwood, refers to "making certain statements through your attorneys * * *." Furthermore, Gandy, the author of Exhibit 75, stated that it was "the only letter that I have ever written to either Mr. Lonergan or the Louis Martin Company" (R. 190).

It was the Government's theory, abundantly supported by the evidence, that Louis Martin Company was in truth and in fact Pierce Lonergan, and that the acts and conduct of Louis Martin Company, as well as letters written by J. R. Walsh for that company, were all acts done under the direct supervision and control of the petitioner, Loner-

gan. The evidence convincingly demonstrates that the Seattle Metal Exchange itself, its four brokerage firms, and their agents and salesmen, all acted pursuant to the directions of the petitioner. The origin of the exchange, the composition of its brokerage firms, and the entire history of the scheme render this conclusion irresistible. With particular reference to Louis Martin Company, the record shows that it was a corporation originally owned by Lonergan, but was transferred to J. R. Walsh. Lonergan was president of the exchange (R. 43). Lonergan employed one Coventry, who acted as manager for Louis Martin Company (R. 42).

Salesmen and agents of Louis Martin Company were employed either directly by Lonergan or by Lonergan in conjunction with Walsh (R. 83, 161, 169, 174). Lists of customers were furnished salesmen by Lonergan and meetings were held at which Lonergan instructed salesmen and gave "pep talks" (R. 44). Checks for payment of Louis Martin Company accounts were drawn by Lonergan as well as by Walsh (R. 64). Communications, including some charged in the various counts of the indictment, were sent out by Louis Martin Company under the direction of Lonergan (R. 50, 56). J. R. Walsh, the president of Louis Martin Company, told W. G. Coventry, the office manager, that his (Walsh's) position was under the control and direction of Lonergan, and that

every action he undertook he did under the direction of Lonergan, including the conduct of the affairs of Louis Martin Company (R. 61). Arthur Sternoff, a salesman for Louis Martin Company, was told by Lonergan it would be best to sever his connections with that company. Several days later Lonergan saw Sternoff typing a letter in the office of Louis Martin Company and said: "Didn't I tell you to get out of here?" In response to Sternoff's query, "Who are you to order me out of Louis Martin & Company's office", Lonergan replied: "I am President of the Exchange, I control everything around here, and what I say goes" (R. 165). Another witness testified to having overheard this conversation (R. 168).

In view of this testimony there can be no reasonable doubt that the acts and conduct of Louis Martin Company and J. R. Walsh were the acts and conduct of the petitioner Lonergan. We submit that after the reception of Exhibit 76–A and Exhibit 76–B, Exhibit 75, in reply to which they were written (R. 190), was properly admitted to explain their contents and to assist both court and jury in evaluating the entire correspondence as an integral part of the course of dealings between Atwood and the petitioner. For this reason the cases principally relied upon by the petitioner (Pet. 14–17) are clearly distinguishable. In every case cited by the petitioner where the admission of the letter or other document was held to be error, there

was a lack of evidence of defendant's notice or knowledge of the contents, or of defendant's connection therewith, or, in those cases involving the admission of a letter addressed to defendant, the letter was not answered or acted upon by defendant. Thus *Reinecke* v. *United States,* 278 Fed. 724 (C. C. A. 8th), is entirely distinguishable, as the bill of lading was never in the possession of or known about by the defendant. In *Harrison* v. *United States,* 200 Fed. 662 (C. C. A. 6th), the letter in question was written to defendant two years before the transactions forming the basis of the indictment, was remote in point of time, and, furthermore, was not shown to have been answered or acted upon by defendant. In *Berry* v. *United States,* 15 F. (2d) 634 (C. C. A. 5th), the petition for appointment of a receiver in bankruptcy, prepared by creditors of defendant, was not shown in any way to have been acted upon by or brought to the knowledge of defendant. In *Hart* v. *United States,* 240 Fed. 911 (C. C. A. 2d), the letter written to accused charging him with crimes and falsehoods was not answered by defendant. The case of *Shepard* v. *United States,* 290 U. S. 96, involved the admission of a purported dying declaration and is beside the point.

But in the case at bar not only was Exhibit 75 answered by the petitioner through Louis Martin Company, but Exhibit 76–A set forth an account of the actual sale of Atwood's silver future contracts,

whereas it appears there was no such actual sale but merely a paper sale to P. A. Jordan and Company, which was dominated by petitioner Lonergan. Atwood's contracts were probably some of the many customer's contracts eventually sold to William Piggot, a dummy account of Lonergan's (R. 211, 212). Moreover, Exhibit 76–B offered to reinstate Atwood's contract, which reinstatement, as admitted by Lonergan, would have been illegal (R. 326).

Both Exhibits 76–A and 76–B were studied attempts by the petitioner to satisfy a defrauded investor and to allay his suspicions. Exhibits 76–A and 76–B were introduced by the Government as instruments of Lonergan in furtherance of and to effectuate the scheme to defraud charged in the indictment. It should here be noted that Exhibits 76–A and 76–B were mailed before the mailing of the letters constituting the basis for Count 8 of the indictment, one of the counts on which the petitioner was convicted. From this as well as from abundant evidence to be found throughout the record, it is clear that Exhibits 76–A and 76–B were mailed while the fraudulent scheme was still in operation. The culmination of the scheme did not take place until the last of the silver held in escrow for the petitioner was sold and remittance made of the proceeds. The principal remittance was made on August 31, 1934 (R. 221).

In view of the convincing evidence of the petitioner's domination of all operations on the Seattle

Metal Exchange, we submit that Exhibit 75, when considered in conjunction with Exhibits 76–A and 76–B, was competent, material and relevant, not only with respect to the petitioner's general scheme, but with particular reference to his handling and disposition of the customer Atwood's account. (Cf. *Salinger* v. *United States,* 272 U. S. 542, 547, wherein a letter written to defendant but not answered was held admissible.)

In mail fraud cases the courts have consistently held that letters and other documents relating to transactions between the defendant and the person defrauded are admissible to show that the scheme charged in the indictment contemplated the use of the mails and as bearing on the intent with which the business was done and the existence of a scheme to defraud. *Rumble* v. *United States,* 143 Fed. 772 (C. C. A. 9th); *Brooks* v. *United States,* 146 Fed. 223 (C. C. A. 8th); *United States* v. *Dexter,* 154 Fed. 890 (N. D. Iowa); *United States* v. *Marrin,* 159 Fed. 767 (E. D. Pa.); affirmed, 167 Fed. 951 (C. C. A. 3d), certiorari denied, 223 U. S. 719; *Samuels* v. *United States,* 232 Fed. 536 (C. C. A. 8th); *Linn* v. *United States,* 234 Fed. 543 (C. C. A. 7th).

Frequently, as in the case at bar, the fraudulent scheme involving the use of the mails is extensive in scope and the precise delimitation of the evidence of its ramifications which may be properly received must rest largely in the discretion of the trial judge.

In *Gould* v. *United States,* 209 Fed. 730 (C. C. A. 8th), at page 739, the court said:

> In cases involving schemes to defraud the courts very properly allow a wide latitude in the admission of evidence for the prosecution, for it is only in this way that fraud can be established.

Thus in *Rice* v. *United States,* 35 F. (2d) 689 (C. C. A. 2d), certiorari denied, 281 U. S. 730, involving the use of the mails to defraud purchasers of stock in a mining corporation controlled by defendants, letters of resignation of certain directors of the corporation stating that defendants were engaged in a stock selling scheme rather than an honest attempt to develop the mine, which were answered in the form of articles boasting of the mine property, were held admissible. See also *Rumble* v. *United States,* 143 Fed. 772 (C. C. A. 9th), a mail fraud case, wherein a letter written to defendant, even though not answered by him, was held admissible where it was part of a large correspondence between the parties which tended to show the falsity of the representations charged in the indictment.

Since Exhibit 75 sought information from the petitioner respecting Atwood's account and Exhibits 76–A and 76–B by their language indicate they were written in response to this request, it is submitted that Exhibit 75 was competent evidence and admissible for the purpose of explaining the

replies thereto in order to give the jury a complete picture of the transactions between petitioner and Atwood. Cf. *St. Clair* v. *United States,* 154 U. S. 134, wherein this Court stated that acts, conduct and declarations attending a particular transaction may be so interwoven with each other that they cannot well be separated from each other without depriving the jury of proof that is essential in order to reach a just conclusion, in which case they are admissible as constituting part of the *res gestae.*

If there were parts of this letter which the petitioner regarded as incompetent, it was incumbent upon him to point out the improper portions by explicit objection. Though at the trial petitioner objected to the introduction of the exhibit as a whole on the ground it was hearsay, self-serving and the statements of a third party, at no time did he point out the accusatory statements which for the first time he complains of in his petition as invading the province of the jury, nor did he request that the objectionable parts be deleted or in any way kept from the jury. Objections to the admission of documentary evidence, admissible in part, must, of course, be specifically directed at the parts which are inadmissible. *Longsdorf Cyclopedea of Federal Procedure,* Vol. 5, Section 2279.

We believe it has been shown that Exhibit 75 was competent to explain Exhibits 76–A and 76–B and

admissible as part of a larger correspondence, and the trial court was not requested to delete or exclude any part thereof which petitioner considered objectionable. Therefore, it is unnecessary to discuss at length the question whether the accusatory statements in this exhibit, together with the petitioner's replies thereto, were competent as tacit admissions of the truth of the statements. The petitioner's mere silence or his failure to answer a written charge of fraudulent dealing would not ordinarily render such writing admissible, yet when such written charge is answered by or on behalf of the defendant, the studied evasion of a reply, the further falsification of material facts (Ex. 76–A), a noncommital offer of compromise, known by the petitioner to be impossible of fulfillment (Ex. 76–B), might well justify a prudent judge in submitting the entire correspondence to the jury over objections much more specific and pointed than in the case at bar (R. 189). Courts have taken cognizance of this rule of evidence based on human conduct in determining the admissibility of documents and have sanctioned the admission of statements or letters accusatory of a defendant which defendant either failed to deny or only partly denied. See *Benn* v. *Forrest,* 213 Fed. 763 (C. C. A. 1st); *State* v. *Greene,* 38 Utah 389; *Fenno* v. *Weston,* 31 Vt. 345, 351; Wigmore on Evidence (2d Ed.), Vol. 2, Sections 1071, 1073.

III

THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN REFUSING TO NOTICE AS PLAIN ERROR THE ADMISSION IN EVIDENCE OF EXHIBIT 75

The pertinent portion of Rule XI of the court below, which the petitioner invokes, reads as follows:

> * * * and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

The petitioner contends that the admission in evidence of Exhibit 75 was error so plain that the court below was required to notice it, even if the petitioner's assignment of error relating thereto was insufficient. This contention must fail for two reasons: (1) The court below was not, as the petitioner erroneously assumes, under a mandatory duty to notice error not properly assigned, but rather its action was a matter of judicial discretion. (2) The error, if any, in the admission of Exhibit 75 was not "plain error" of such a substantial nature as to render the refusal of the court below to notice it an abuse of discretion.

1. The petitioner (Pet. 19) mentions the compulsion upon an appellate court to notice error, even though not saved and assigned in accordance with existing rules of the court. A Circuit Court of Appeals in determining whether an unassigned error is plain error within the meaning of the rule does so in the exercise of a sound discretion in or-

der to prevent a miscarriage of justice. The assumption that it must notice the error is refuted by the very language of the rule itself: "but the court, at its option, may notice a plain error not assigned." Acceptance of the petitioner's theory would require the court below, even in the absence of objections or assignments of error, to read the entire record and review every exercise of discretion by the trial court in the admission or rejection of evidence.

We are not here concerned with questions of fundamental error such as want of jurisdiction or failure of the indictment to charge an offense or obvious deprivation of constitutional rights which the appellate court should and does review irrespective of the appellant's failure or neglect properly to raise such questions. Here the petitioner asserts merely that in a prolonged trial involving many extremely complex and technical transactions, the judgment must be reversed and the case retried because of a single and relatively unimportant lapse of the trial judge in the reception of evidence, however delinquent the petitioner may have been in saving the error for review. The admission or rejection of evidence during the course of a trial rests largely within the discretion of the trial judge, who frequently is faced with questions of legal admissibility which must be decided without extended consideration or argument. Such being the case, appellate courts in reviewing

this exercise of discretion are naturally and justifiably reluctant to overrule the trial court. For this reason the appellate court is vested with discretionary power under the rule in question to decide whether or not the alleged error of the trial court is so plain that it deserves to be noticed on review, even though not assigned.

In *Weems* v. *United States,* 217 U. S. 349, at page 362, this Court, in construing an almost identical provision in its rules, said: "It confers a discretion that may be exercised at any time * * *." The cases cited by the petitioner (Pet. 19), which could be supplemented by numerous others involving the application of the rule in question, go no farther than to hold what is undisputed—that the court will, in the exercise of the discretion vested in it, notice error of a substantial and vital character seriously affecting a party's rights, notwithstanding the absence of proper preservation of the error, and that the absence of such proper preservation of the error will not preclude the court from exercising its option.

2. We submit that the error, if any, in the admission in evidence of Exhibit 75, was not so apparent upon the face of the record and of such controlling nature that the refusal of the court below to notice it notwithstanding the absence of proper assignments of error was an arbitrary and unreasonable abuse of its discretion.

In the case at bar the court below, in the sound exercise of its discretion, did not consider the ad-

mission in evidence of Exhibit 75 error of such a controlling nature as to warrant its notice as plain error under Rule XI. Having exercised its discretion in the matter, its action will not be reviewed by this Court unless there was a clear abuse of discretion. What this Court said in *Ray* v. *United States,* 301 U. S. 158, 166, with reference to the supervision by the Circuit Court of Appeals over proceedings for appeal, seems equally appropriate to the point here involved:

> The supervision and control of the Circuit Court of Appeals under the Criminal Appeals Rules calls for the exercise of a sound judicial discretion, and its action will not be reviewed unless it appears that its discretion has been abused.

Various courts in numerous instances have had occasion to relax the strict enforcement of rules and notice error not assigned, but have not attempted to define generally what constitutes "plain error" within the meaning of the rule, since each case of necessity depends upon its particular facts and circumstances. The practice of noticing error as plain error is one that ought not to be extended since its purpose is not that the court shall sift the record but only that it may notice errors which are obvious and vital, the underlying principle being to prevent a miscarriage of justice. *P. P. Mast & Co.* v. *Superior Drill Co.,* 154 Fed. 45 (C. C. A. 6th); *Rep. Iron and Steel Co.* v. *Porter,* 228 Fed. 188 (C. C. A. 6th); *Sucesores de Perez Hermanos*

v. *Costa,* 281 Fed. 439 (C. C. A. 1st). Even the fact that the error, if it had been properly assigned, would constrain the court to reverse the judgment is not of itself sufficient to impel the court "under the discretion reserved in the rule" to notice the error. *National Acc. Society* v. *Spiro,* 78 Fed. 774, 779 (C. C. A. 6th), certiorari denied, 168 U. S. 708. Whether the accused is prejudiced by the erroneous admission of evidence at a trial should not be considered abstractly. The question is rather one of practical effect when the trial as a whole and all the circumstances of the case are regarded. *Williams* v. *United States,* 265 Fed. 625 (C. C. A. 8th).

The court below should not be deemed to have erred in the case at bar for insisting upon the orderly observance of its rules unless in fact the trial court committed error so plainly prejudicial that the petitioner was deprived of substantial justice. We have shown that Exhibit 75 was admissible in evidence as tending to explain Exhibits 76–A and 76–B, which in themselves were letters which the petitioner caused to be mailed in furtherance of the scheme to defraud while such scheme was in progress. Furthermore Exhibit 75 was introduced and received as part of a larger correspondence and course of dealings between the petitioner and Atwood respecting the latter's account. At the trial the petitioner made no specific objection to or motion to strike from this exhibit the accusatory statements of which he now vigorously complains.

There was an abundance of evidence to justify the jury in finding that the petitioner devised a scheme to defraud investors, and that he mailed or caused to be mailed the letters set forth in the indictment in furtherance of this scheme. The evidence justifies the conclusion that the following representations were fraudulently made by the petitioner: that the break in the Seattle Market was caused by a California syndicate dumping 200,000 ounces of silver on that market through P. A. Jordan and Company (R. 51, 86, 105; see R. 184); that if a raid was made on the Seattle market the other world exchanges, such as New York and Shanghai, would come to the aid of the Seattle Market, thus preventing any break in the Seattle market (R. 45, 78, 84, 162); and that the moneys paid in as margins by both buyers and sellers were held in a clearing house as a trust fund for the protection of investors (R. 48, 74, 86, 124). There being convincing and compelling evidence that the petitioner repeatedly made fraudulent representations, we submit that the reception of Exhibit 75 as part of a larger correspondence, did not, because of the writer's expression of opinion, constitute error so flagrant as to suggest a miscarriage of justice. This becomes even more apparent when Exhibit 75 is read as a whole in connection with the testimony that preceded it. In this light the exhibit was relevant and material on the question of the petitioner's fraudulent intent. Error, if any, in the

admission of this exhibit was not so substantial or so clearly prejudicial as to warrant reversal of the judgment. See Judicial Code, Section 269, as amended (U. S. Code, Title 28, Section 391). Cf. *Horning* v. *District of Columbia*, 254 U. S. 135.

The petitioner devotes twenty-five pages of his brief (Br. 8–34) to an extended argument in support of a contention that the Government did not establish the indictment as laid. Having failed to raise this point in his petition for a writ of certiorari he is, of course, precluded from arguing the question before this Court. In any event, both the trial court and the court below were of the opinion that the scheme described in the indictment was proved substantially as alleged and that there was substantial evidence that the petitioner devised the scheme and mailed or caused to be mailed in its execution the letters set forth in the indictment (R. 454). The correctness of the concurrent action of the two lower courts is shown by the evidence, some of which we have referred to in the Argument and some of which is set out in Appendix A, *infra*. As said by this Court in *Delaney* v. *United States*, 263 U. S. 586, 589–590:

> Petitioner attacks the judgment as not being supported by the testimony, a great deal of which is detailed. The immediate reply is that the probative sufficiency of the testimony has the support of the District

> Court (in which is included the verdict of the jury) and of the Circuit Court of Appeals. It would take something more than ingenious criticism to bring even into question that concurrence or to detract from its assuring strength—something more than this record presents.

This language is equally applicable to the instant case.

CONCLUSION

We therefore respectfully submit that the judgment of the Circuit Court of Appeals for the Ninth Circuit should be affirmed.

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Solicitor General.
BRIEN MCMAHON,
Assistant Attorney General.
WILLIAM W. BARRON,
J. ALBERT WOLL,
Special Assistants to the Attorney General.
GEORGE F. KNEIP,
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STEPHEN M. FARRAND,
W. MARVIN SMITH,
Attorneys.

JANUARY 1938.

APPENDIX A

SUMMARY OF GOVERNMENT'S EVIDENCE

The Seattle Metal Exchange, also known as the Seattle Silver Market, was incorporated in 1931 by the petitioner Pierce Lonergan and his wife at a capitalization of $1,000 (R. 327). It existed in name only until June, 1933, at which time it was used in dealing in contracts for future delivery of silver (R. 328). At about this time there came into existence four brokerage firms: Pierce Lonergan and Company, P. A. Jordan and Company, Louis Martin Company and Gill and Company.

Pierce Lonergan and Company was a trade name for Pierce Lonergan (R. 302). P. A. Jordan and Company was an assumed name used by George Goggin, a brother-in-law of Lonergan, and was formed at the suggestion of Lonergan (R. 101). Louis Martin Company was incorporated by Pierce Lonergan in 1932, and transferred to John R. Walsh (R. 285, 328). Gill and Company was represented by Louis Gill, who from June, 1932, until June, 1933, was employed by Lonergan (R. 195) and prior thereto had been in the wholesale drug business (R. 328).

Lonergan was the head of the Seattle Metal Exchange (R. 43, 49, 95). Lonergan, Goggin, Walsh and Gill were the only broker members of the Exchange and the only persons allowed to participate in the trading and to make bids or offers (R. 43, 101).

He employed one Coventry, who acted as manager for Louis Martin Company (R. 42). He interested Norman Coles in associating with Louis Martin Company (R. 83). Sternoff and Lindman who were identified with Louis Martin Company were also employed by Lonergan (R. 162, 169). Lonergan and Walsh made arrangements with Ray Thompson and Arthur Pritchard of Tacoma to act as associate brokers (R. 174). It was the business of the salesmen to contact the public and interest people in the purchase of silver futures. For this purpose Lonergan furnished lists of prospective customers (R. 44).

Lonergan addressed various service clubs and civic organizations of Seattle and neighboring cities on silver (R. 82). Frequent meetings were held under the direction of Lonergan which were attended by the salesmen of all four brokerage firms as well as by the brokers, at which meetings Lonergan gave lectures and explanatory talks in reference to the silver market (R. 43, 44, 84). At these meetings, as well as to individual salesmen and investors, Lonergan made the following statements and representations:

1. That the purchase of silver futures contracts on a margin was the safest investment possible as silver must inevitably rise in price and there was every chance to win and no chance to lose (R. 46, 78, 83–85, 86, 100, 121, 124, 142).

2. That if any raid was made on the Seattle Metal Exchange the exchanges in New York, London, and Shanghai would come to the aid of the Seattle Exchange, thus preventing any break in the market (R. 45, 78, 84, 124, 162).

3. That all moneys paid in as margins by the buyers together with an equal amount put up by the seller were held by the exchange in escrow in a clearing house as a trust fund for the protection of the investors (R. 48, 74, 86, 124, 163).

These representations and statements were repeated by the salesmen to prospective customers and investors pursuant to the instructions of and in reliance on the statements of Lonergan (R. 44, 86, 163, 170).

There was in fact no connection between the Seattle Exchange and the exchanges of New York, Shanghai, and other world exchanges (R. 203), nor did any of these other exchanges come to the aid of the Seattle Exchange when the break in the latter exchange did occur (R. 46). All the moneys paid in as margins by the investors was not placed in escrow in the clearing house as a trust fund, as there was no trust fund (R. 196).

Weekly market letters were prepared either by or under the direction of Lonergan in which the future of silver as a commodity and the opportunity for investments in silver over the exchange were set forth in optimistic terms (R. 50). One market letter was sent out almost a month after the enactment of the so-called Silver Purchase Act by Congress in June, 1934 [1] (Exhibit No. 52; R. 377). These market letters were mailed under the direction of Lonergan to customers and prospective customers (R. 50).

Beginning approximately in June, 1933, the Seattle Metal Exchange dealt almost exclusively in silver futures contracts on margin and virtually

[1] Act of June 19, 1934, c. 674, 48 Stat. 1178.

every investor purchased silver for future delivery on margin (R. 48, 49). Whereas the New York Exchange dealt in units of not less than 25,000 ounces of silver, the Seattle Metal Exchange dealt in silver futures contracts with units as small as 500 ounces (R. 48, 103). Originally the margin requirement was ten cents an ounce or $50 for 500 ounces of silver, but this was later changed to twelve cents an ounce. In June, 1934, after Congress enacted the so-called Silver Purchase Act to stabilize silver and imposed a 50% tax upon the profit from dealing in silver, the margins were reduced from $60 for 500 ounces to $30 for 500 ounces, corresponding to a reduction of from 12 to 6 cents an ounce (R. 47, 84, 85).

During the approximate year in which the Seattle Metal Exchange dealt in silver futures contracts, 6,339 contracts were sold over the exchange and 5,073 contracts were bought over the exchange in the names of O'Connell, LaPlante, Shephard, Schmidt, Ginsberg, Goggin, Dineen, Casey, and Whalen (R. 212). These names and orders were placed through the exchange by Lonergan and his associates. None of these persons actually engaged in the buying or selling of silver futures contracts and some of them never authorized the use of their names (R. 102, 103, 105, 200, 204, 205). 1983 contracts represented transactions in which the above names were on both sides of the market while in only four contracts were *customers* on both sides of the market (R. 212).

In December, 1933, the Seattle First National Bank, at the request of Lonergan, purchased silver bullion with money borrowed by Lonergan from the Eddy Investment Company. This silver was held

in escrow by the bank as collateral for the repayment of this loan pursuant to an agreement between Lonergan and the Eddy Investment Company. On July 25, 1934, the greater portion of this silver was sold in New York at Lonergan's direction. The price received was 46¼¢ per ounce (R. 219, 220).

On July 27, 1934, Goggin of P. A. Jordan and Company, at the request of Lonergan, offered on the Seattle Metal Exchange fifty contracts for sale at approximately 3¢ below the market (R. 106, 197). The rules of the Seattle Metal Exchange limited the drop to 3¢ below the previous day's low (R. 55). There were no takers. This drop of 3¢ in the Seattle quotations was the first break in the silver futures market which finally resulted in wiping out the investments of all customers. This drop of 3¢, when there had been no appreciable change on the New York or other markets, caused consternation among the salesmen. The various salesmen and agents met and passed a resolution urging that the Exchange be closed for three days to enable them to find purchasers for the contracts being offered for sale (R. 54, 164). Lonergan refused to close the exchange and both he and Walsh told various salesmen, associate brokers, and investors that the drop in the Seattle Exchange was caused by a California syndicate dumping 200,000 ounces of silver on the Seattle market for sale through P. A. Jordan and Company at the best price obtainable (R. 51, 86, 163). No California syndicate or anyone else offered 200,000 ounces of silver for sale through P. A. Jordan and Company, nor did any California syndicate at any time prior to July 27th, purchase any silver through P. A. Jordan and Company (R. 105, 106).

The only silver offered for sale at this time was the offer by Goggin of 50 contracts at the request of Lonergan. On July 28, Lonergan stated to Mrs. Coventry: "I am going to break the market wide open and by the end of the week there will be nothing left," and further stated he could have told months ago when this was going to happen and just what was going to happen (R. 223).

The next trading day, July 30, more contracts were offered for sale, again at 3¢ below the closing price of the prior trading day (R. 55, 106). Again there were no bids and no purchases (R. 106) and again the market dropped 3¢. On July 31, the market dropped again (R. 55, 87). Thus during the three trading days of July 27, 30, and 31, there was a drop of approximately 9¢ (R. 87, 198). While the price on the Seattle market was thus dropping, that of the New York market rose (R. 55, 202). Prior to this break in the market the average price of the Seattle market for more than a year was two to three cents higher than the New York market (R. 62, 177).

When the first drop in the price on the Seattle Metal Exchange occurred the accounts of many of the customers were wiped out. Letters and telegrams were sent to the customers demanding the deposit of additional margin (R. 55, 87, 95). Some of these letters were compiled and sent out by direction of Lonergan (R. 87).

Many of the customers deposited in escrow the additional margin demanded, to be paid when the silver was delivered to them. In each case their original margin was lost and their escrow money returned (R. 144, 184, 198).

On July 25, 1934, two days before the first break in the market, there were 1,245 purchase contracts of customers on the records of the four brokerage firms representing 622,500 ounces of silver. Between July 31 and August 21, 1,082 of these contracts were sold to one William Piggott (R. 211, 212) which was a dummy account of Lonergan's (R. 206). The remaining 123 contracts were cancelled (R. 212). On August 9, 1934, by Presidential Proclamation (49 Stat. 3402), silver was nationalized. Late the same month, the silver remaining in escrow in the Seattle First National Bank was sold to the Government at 50¢ an ounce, the principal remittance being made to the bank on August 31, 1934 (R. 221).

The evidence showing mailing and receipt of the indictment letters will be found on the following pages of the record: Count 1.—(R. 82, 137, 138); Count 2.—(R. 181); Count 3.—(R. 50, 138); Count 4.—(R. 88); Count 5.—(R. 87); Count 6.—(R. 56, 58, 206), Count 8.—(R. 95, 96).

APPENDIX B

Exhibit No. 75 reads as follows (R. 384):

AUGUST 17, 1934.

Mr. PIERCE LONERGAN,
211 American Bank Building,
Seattle, Washington.

DEAR SIR: We are attorneys for Mr. A. M. Atwood who for approximately the last year and a half had been buying and selling silver on the Seattle Metal Exchange, through Louis Martin Company, silver brokers.

During the middle of July last, Mr. Atwood had on hand silver futures, as follows: 1,000 ounces September, 2,000 ounces September, 2,000 ounces March, 1935, with a total credit margin of $324.93 in cash.

By reason of an alleged dumping of several hundred thousand ounces of silver on the Seattle market at approximately that time, the market was driven down each day to the maximum permitted under the law, with the result that on July 28th, Louis Martin Co. advised Mr. Atwood that an extra margin requirement was necessary to maintain his silver options, and that it must be put up not later than Monday, July 30th, and failing to do so, would necessitate the selling of his silver options at the market.

After conferences with Mr. Pierce Lonergan and Mr. J. P. Walsh, Mr. Atwood deposited $400.00 in the Trust Department of

the First National Bank, as an extra margin, conditioned upon the performance of your contract and by the delivery by you of 3,000 ounces of September option silver bullion .999 fine and 2,000 ounces of March option silver bullion .999 fine.

Mr. Atwood thus had covered the required margins. On Monday, August 6th, Mr. Atwood had a conference with Mr. Pierce Lonergan, wherein Mr. Lonergan informed Mr. Atwood that the Seattle Metal Exchange was broke; that Louis Martin Co. was broke and that there was an impending law suit involving about $150,000, which suit would tie up all the funds in Louis Martin Co., and the Seattle Metal Exchange, and that Mr. Atwood had better hurry and get his $400 deposit back before these litigants tied it up and attached it, Mr. Lonergan at that time informing Mr. Atwood that the attorneys for such litigants were in conference and that the suit would be started immediately. Accordingly, Mr. Atwood attempted to reach Mr. Walsh in order to secure a release of his deposit at the First National Bank and was unable to do so on that day.

On August 9th, however, Mr. Atwood reached Mr. Walsh, who made arrangements for Mr. Atwood to take back his $400.00 deposit in the First National Bank. Mr. Atwood took Mr. Walsh's letter authorizing the withdrawal of the $400 deposit and obtained such deposit.

Within an hour after Mr. Atwood had withdrawn his deposit and sold his silver options at Mr. Lonergan's and Mr. Walsh's pleadings, the President proclaimed the nationalization of silver, at 50.01.

The allegations and persuasions made by Mr. Pierce Lonergan and Mr. J. P. Walsh to Mr. Atwood were obviously fraudulently made and were made solely with the intent to get Mr. Atwood out of the market in order to buy his silver at a low price in order that the same might be sold upon the nationalization of silver, which latter event Mr. Pierce Lonergan had been expecting for some time.

Reference is here made to Rem. Rev. Stat. of the State of Washington, No. 2477, and as attorneys for Mr. A. M. Atwood, and pursuant to said statute, we herewith demand that the Seattle Metal Exchange and Louis Martin Co., or either, or both, furnish Mr. Atwood a written statement containing the names of the persons to whom his silver options were sold, the time when, the place where, the amount of, and the price at which the same was sold. You may comply with this demand by furnishing the same within 48 hours to the writer, at this office.

You are further advised that Mr. A. M. Atwood was defrauded by the misrepresentations of Mr. Pierce Lonergan and Mr. J. P. Walsh and that he will seek legal redress, if necessary, to recover his damages sustained by him by reason of such fraudulent misrepresentations.

Yours very truly,

BATTLE, HULBERT, HELSELL & BETTENS,
By JOSEPH E. GANDY.
JEG: AC.

Exhibit No. 76–A reads as follows (R. 386):

Eliot 3055.
Cable address "Lomar", Seattle.

LOUIS MARTIN COMPANY,
Bullion Brokers,
American Bank Building,
SEATTLE, WASHINGTON *August 20, 1934.*

BATTLE, HULBERT & HELSELL,
10th Floor Exchange Building,
Seattle, Washington.

Attention Mr. Joseph E. Gandy

GENTLEMEN: Following is the information requested by you regarding the transactions for the account of Mr. A. M. Atwood on August 9, 1934.

Option	Price	Amount	Sold to—
6 Sept	44¢	$1,320.00	Jordan Co.
4 March	44¢	880.00	Jordan Co.

These transactions took place at Seattle, Washington. Any further information you may wish, please advise us.

Yours truly,
LOUIS MARTIN CO.

JRW: MLH. J. R. WALSH—(M. L. H.)

Exhibit No. 76–B reads as follows (R. 387):

Eliot 3055. Cable address "Lomar", Seattle
LOUIS MARTIN COMPANY,
Bullion Brokers,
American Bank Building,
SEATTLE, WASHINGTON *August 21, 1934.*

Mr. A. M. ATWOOD,
c/o John Davis Co.,
Seattle, Washington.

DEAR SIR: Your communication of the 19th day of August, making certain statements through your attorneys regarding the manner in which your Silver contract account with Louis Martin Co. had been handled, has been received.

This is to advise you that upon your depositing with us the sum of two thousand two hundred and thirty-eight dollars & seventy-five cents ($2,238.75), representing ninety per cent (90%) of the contract price of the Silver contracted by you your account will be reinstated for the amount of Silver and at the price contracted by you, provided, however, that you comply with the terms, conditions and provisions upon which you originally contracted the Silver and particularly the terms of your contract as evidenced by your signature card.

The deposit of $2,238.75 with us must be made by you on or before noon, Thursday, August 23, 1934.

Sincerely yours,

LOUIS MARTIN CO.,

By J. R. WALSH—(M. L. H.)

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

No 121.—October Term, 1937.

Pierce Lonergan, Petitioner, *vs.* The United States of America.	Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 31, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

In the District Court, Western District of Washington, the petitioner was convicted of violating Sec. 215 Criminal Code (18 U. S. C. A. 338), by using the mails for fraudulent purposes. He appealed to the Circuit Court of Appeals, Ninth Circuit, and filed —August 14, 1936—forty assignments of error. The judgment of conviction was affirmed March 6, 1937, upon an opinion which, among other things, states—

"Twenty-eight assignments (numbered 5, 9 to 25, inclusive, and 31 to 40, inclusive) are to the admission of and refusal to strike out evidence. The assignments do not indicate that any of this evidence was objected to in the trial court. They do not state what objections, if any, were made, nor the grounds thereof, nor the grounds, if any, on which appellant moved to strike out the evidence. Such assignments do not conform to our Rule 11 and will not be considered. Cody *v.* United States (C. C. A. 9), 73 F. (2d) 180, 184; Goldstein *v.* United States (C. C. A. 9), 73 F. (2d) 804, 806."

This ruling we think was error. Through wrongful interpretation and application of the rule petitioner was denied a proper hearing.

At the date of the appeal the pertinent portion of Rule 11 read as follows—"When the error alleged is to the admission or the rejection of evidence the assignment of errors shall quote the full substance of the evidence admitted or rejected."

Concerning this provision, the opinion in *Goldstein* v. *United States,* (1934) 73 F. (2d) 804, 806, declared—"The assignment of error must not only quote 'the full substance of the evidence admitted or rejected,' but it must also state the error asserted and

intended to be urged. This requires that the objection and ruling of the court upon the objection and the exception to the ruling be incorporated in the assignment of error." Adhering to this interpretation, the court persistently refused to consider assignments deemed not in conformity therewith.

Between the appeal and announcement of the opinion under consideration, Rule 11 was amended so as to provide—"When the error alleged is to the admission or rejection of evidence the assignment of error shall quote *the ground urged at the trial for the objection and the exception taken and* the full substance of the evidence admitted or rejected."

Manifestly petitioner had the right to rely upon the rule, properly construed, as it stood at the time of his appeal—before the amendment. And if analysis of one of the rejected assignments discloses substantial compliance, the cause must go back for further consideration of the record.

Litigants may not be deprived of a hearing upon their points by wrongful construction of rules nor by their arbitrary application. An unwarranted construction has been given to the language of Rule 11; properly interpreted, it did not require petitioner to do all the things specified by the amendment.

The substance of Assignment No. XVI follows—

"The court erred in admitting in evidence, and denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 75, being a letter on the letterhead of Battle, Hulbert, Helsell & Bettens, as follows:" [This letter—a long one—dated August 17, 1934, addressed to petitioner and signed Battle, Hulbert, Helsell & Bettens, by Joseph E. Gandy, is set out in full. It states, among other things, that certain "allegations and persuasions" made by the petitioner to one Atwood "were obviously fraudulently made" and that one "Atwood was defrauded by the misrepresentations", etc.]

"The testimony in support of its admission given by witnesses A. M. Atwood and Joseph Gandy, is substantially as follows." [Here follows a resume of the testimony given by these witnesses.]

"The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

"1. It was hearsay evidence, contained conclusions of third parties, and happened subsequent to the termination of the alleged plan.

"2. It was a self serving statement of a third party making the statements therein contained.

"3. It was highly incompetent, irrelevant and immaterial, and in its nature highly prejudicial to the defendant. Its admission was not necessary to clarify 76-A and it was not related to 76-B."

We think this assignment adequately met the applicable requirements of Rule 11. Clearly, it quoted the full substance of the evidence admitted and was definite enough to enable both court and opposing counsel readily to perceive the point intended to be relied on. *Seaboard Air Line Ry. Co.* v. *Watson,* 287 U. S. 86, 91.

Other assignments also seem sufficiently definite and formal to demand consideration. We do not pass upon the merits of any assignment and decide only that some, if not all, of them were improperly rejected.

The challenged judgment must be reversed. The cause will be remanded to the Circuit Court of Appeals for further proceedings in harmony with this opinion.

Reversed.

Mr. Justice CARDOZO took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.